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HARVARD

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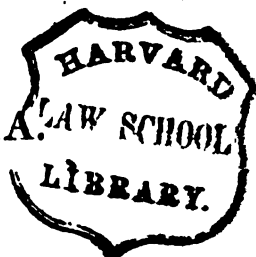
CASES

ADJUDGED IN THE

SUPREME COURT

OF

PENNSYLVANIA.



BY HORACE BINNEY.

VOL. II.

PHILADELPHIA:

PUBLISHED BY FARRAND AND NICHOLAS.

1810.

District of Pennsylvania, to wit:

***** BE IT REMEMBERED, That on the twenty fifth day
* Seal. * of July, in the thirty-fifth year of the Independence of
* the United States of America, A. D. 1810, Horace Binney,
***** of the said district, hath deposited in this office the title
of a book, the right whereof he claims as author, in the words following, to wit:

“Reports of Cases adjudged in the Supreme Court of Pennsylvania. By Horace Binney. Vol. II.”

In conformity to the act of the congress of the United States, intituled, “An act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned.” And also to the act, entitled “An act supplementary to an act, entitled “An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned,” and extending the benefits hereof to the arts of designing, engraving, and etching historical and her prints.”

D. CALDWELL,

Clerk of the District of Pennsylvania.

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JUDGES
OF THE SUPREME COURT OF PENNSYLVANIA.

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JASPER YEATES, Esq.	} Justices.
HUGH H. BRACKENRIDGE, Esq.	

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ERRATA.

- Page 90, line 19, for "laws" read "law."
234, 24, for "prepare" read "propose,"
449, 31, for "constrained" read "strained."
38, for "or" read "on."

CASES

IN THE

SUPREME COURT

OF
PENNSYLVANIA.

Middle District, July Term, 1809.

2b 1
141 99

1809.

M'KEE and others *against* **STRAUB** and others.

Sunbury,
Saturday,
July 8.

THIS was an appeal from the decision of **BRACKEN-**
RIDGE J. at a circuit court for *Dauphin* in *October 1806.*

The statute of
8 & 9 *William*
3. c. 31. concern-
ing partitions,
does not extend
to this state.

The plaintiffs, who were entitled to an estate for the life of one *Oliver Ramsey* in certain lands of which he was tenant by the curtesy, brought a writ of partition against *Straub* who was tenant of the freehold in common with them, and joined with him as defendants two others who were merely tenants for years or at will under *Straub*. Issue was joined on the plea of "*non tenent insimul*," and before trial, *Straub*, the only defendant having a freehold interest, died. The cause was nevertheless tried in the Circuit Court, and a verdict found for the plaintiffs. Motions were then made for a new trial and in arrest of judgment, as well upon the ground that the writ had abated, as upon other grounds arising from the evidence; but the motions were overruled by his Honour, and the defendants appealed. The following reason for the appeal was alone noticed in the judgment of the court, although others were assigned, and pressed in the argument.

One of three
defendants in a
writ of parti-
tion was tenant
of the freehold,
and died after
action brought
and before trial;
the other two
were his tenants
for years or at
will. Held that
the writ was
abated by his
death; and if
not, the sur-
vivors were en-
titled to a ver-
dict upon the
plea of *non tenent*
insimul.

Vide act of April
7, 1807. 8 *State*
Laws 155.

"That the statute of 31 *Henry VIII.* gives the writ of *partitio-
facienda* to and against tenants of the freehold only.

Vol. II.

A

1809. "That it was proved on the part of the plaintiffs, that they and
 M'KEE "Andrew Straub one of the defendants were tenants in com-
 v. mon of the freehold, and that the other defendants were
 STRAUB. "tenants for years or at will under *Straub*, and not tenants of
 "the freehold; the writ of *partitione facienda* cannot there-
 "fore be prosecuted against them, nor can they be joined
 "with the tenants of the freehold in the same action. That
 "Andrew Straub one of the defendants, and the only party
 "in interest, died before the trial; the writ therefore abated,
 "and there cannot be a verdict or judgment against him."

It was argued at *July* term 1808.

Fisher for the defendants contended *first*, that as the only defendant who had a freehold in the premises, died before trial, the suit was abated. The writ of partition being a real action, lies only against a tenant of the freehold; 16 *Viner* 236. *pl.* 16.; and therefore the interest of the surviving defendants, even if it were competent to join them, contributes nothing to the support of the action. But there was no authority to join them. Between the parties to this suit, there was no compulsory partition at common law; and the only statute which applies to this case, and has at the same time been extended to this country, is the 31 *H.* 8. *c.* 1. which relates merely to tenants of the freehold. At the same time it directs that the writ which it authorizes, shall be pursued at common law; and therefore if it made a tenant for years a good defendant to the writ, it would not help this case, because at common law the death of one of the tenants abates the writ. 16 *Viner* 232. *pl.* 3. But *secondly*, if the writ is not abated, the defendants were entitled to a verdict. The word "tenet" in a writ away implies a freehold. *Co. Litt.* 167. *a.* The issue was that the parties did not hold, that is, the freehold, together; and as to the defendants who survived, so was the fact. The legislature of this state have adopted the provisions of the 8 & 9 *W.* 3. *c.* 31. since the commencement of this action; but there is nothing retrospective in the act.

Duncan for the plaintiffs argued that the statute 8 & 9 *W.* 3. *c.* 31. was in force in *Pennsylvania*, having been

passed prior to the revolution, and followed upon many occasions. The third section of that statute provides that no plea in abatement shall be received in any suit for partition, nor shall the same be abated by the death of any tenant. This action is therefore not affected by the death of *Straub*, if it could have been maintained during his life; and it could have been maintained, because he was a good tenant of the freehold, and the joinder of the others was only matter of abatement. The act of *April 7th 1807*, 8 *St. Laws* 155, does not shew that the statute of *William* has not been extended here, for this can never be shewn by a mere legislative act; nor does the act include the provisions of that statute at full length; the selection of certain of its provisions does by no means shew that the whole had not previously been in force.

1809.

M'KEE
v.
STRAUB.

Cur. adv. vult.

On this day the judgment of the court was pronounced.

TILGHMAN C. J. The word "tenet" in a writ always implies a tenant of the freehold. *Co. Litt.* 167. *a.* The defendants were therefore entitled to a verdict, because it was proved that they were not tenants of the freehold.

It has been urged that the plaintiffs are entitled to a judgment, because by the stat. 8 & 9 *W.* 3. c. 31. the suit shall not abate by the death of any tenant. But the statute is out of the question, as it was made since the settlement of *Pennsylvania*, and does not extend here. I am therefore of opinion that judgment cannot be entered for the plaintiffs, inasmuch as it appears on the record that one of the defendants died since the commencement of the action.

YEATES J. It is a good ground for a new trial, that neither of the defendants who were living at the time of the trial, were tenants of the freehold. Unless this fact was proved, the plaintiffs did not shew themselves entitled to recover.

At common law a real action between co-parceners was abated by the death of any one of the parties, though it was admitted they were not co-parceners, but jointenants. *Cro. Car.* 574. 583. And if in partition, after the first judgment and before the second, one of the defendants dies, the writ

CASES IN THE SUPREME COURT

1809.

M'KEE

v.

STRAUB.

is abated, and the court will not suffer the return of the partition to be filed. Any judgment given against a dead person is erroneous. *Noy*, 145, 6.

The counsel for the plaintiffs put the reason in arrest of judgment on its true ground, viz. the extension of the *British* statute 8 & 9 *W. 3. c. 31. 3 Ruff. Stat.* 683. Now the members of this court in their report to the legislature at the last session, in pursuance of the duties enjoined on them, have not specified this act of parliament as having been extended by practice; and it is observable that our own act of assembly of 7th *April* 1807, 8 *St. Laws* 155, adopts many of its provisions; and particularly the 4th section of our act uses the very expressions of the *British* act, except that instead of the words "the death of any *tenant*," it substitutes "the death of any *defendant*." But our act has no retrospective words, and, the trial being in *October* 1806, can have no operation. The *British* statute then not extending to us, it is conceded that the proceedings cannot be supported, and the judgment must be reversed.

Judgment reversed.

KELLY and another, administrators of FOSTER,
against FOSTER.

IN ERROR.

Sunbury,
Saturday,
July 8.

WRIT of error to the Common Pleas of *Dauphin*.

When the terms of a special agreement to do a certain thing for a certain sum, have been performed by the plaintiff, the law raises a duty in the defendant, for which *indebitatus assumpsit* will lie.

The plaintiff declared in *indebitatus as-*

sumpsit for work and labour, and proved a promise by the intestate to pay him 200*l.* if he would live with him until the intestate's death, which he accordingly had done. *Held* that the general count was supported by the proof.

The declaration by *Foster*, the plaintiff below, against the administrators of *Foster*, contained two counts: the first an *indebitatus assumpsit*, and the second a *quantum meruit*, for work labour and services performed for the intestate in his lifetime. Upon the trial, the plaintiff gave in evidence a promise by the intestate to give him 200*l.* if he would live with him until the intestate's death, and that he accordingly had lived with, and worked for him, up to that time.

The defendant's counsel insisted that the special promise

did not support the declaration, and that the action should have been a special *assumpsit*; but the court charged the jury that if they believed the testimony, it entitled the plaintiffs to their verdict for 200*l.*; and the defendants took a bill of exceptions.

1809.

 KELLY
v.
FOSTER.

The point was argued at *July* term 1808, by *Fisher* and *Duncan* for the plaintiffs in error, and by *Laird*, *contra*.

For the plaintiffs in error it was said, that in order to prevent surprise, and to keep the forms of actions distinct, it had become a settled principle that *indebitatus assumpsit* will not lie where there is a special contract between the parties. In such a case the defendant ought to have notice by the declaration that he is sued upon the contract, as was resolved by the court in *Weston v. Downes* (a). If indeed an end has been put to the contract, as if by the terms of it it is left in the power of the plaintiff to rescind it and he does rescind it, or if it is rescinded with the assent of the defendant, then *indebitatus assumpsit* will lie upon the duty which the law may imply from the original transaction between the parties; but if it continues open, the plaintiff must state the special contract and the breach of it. This is expressly the decision in *Towers v. Barrett* (b), and upon the same ground the court must have gone in *Power v. Wells* (c). In the present case the contract remained open, the plaintiff claimed the precise sum stipulated by it, and the court below stated this sum as the measure of damages; of course the claim was founded exclusively upon the contract, and any implied *assumpsit* to pay for the services performed was out of the question. In the case of *Dutton v. Solomonson* (d), this doctrine is carried so far by the Common Pleas, that where goods had been sold to the defendant to be paid for by a bill at two months, which after delivery of the goods he refused to give, the whole court held that *indebitatus assumpsit* would not lie before the expiration of the two months, and Lord *Alvanley* said he had great doubts whether it would lie afterwards, and recommended a count upon the special contract.

(a) *Doug.* 23.(b) 1 *D. & E.* 133.(c) *Comp.* 818.(d) 3 *Bos. & Pul.* 582.

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For the defendant in error it was answered, that there was sufficient evidence upon the trial to entitle him to a recovery, independent of the special contract, as he proved labour and work done; and there is no doubt that a plaintiff may recover upon a count for a general *indebitatus assumpsit*, if he proves enough to support it, although he has also a count upon a special agreement which he attempts to prove and fails. But the ground of the plaintiff's right to recover in the present action is this, that where the terms of a special agreement are performed by the plaintiff, it raises a duty for which *indebitatus assumpsit* will lie. *Gordon v. Martin* (a), *Bull. N. P.* 139. 1 *Selwyn N. P.* 63. While the special contract remains executory, the party must declare specially; but when it is executed he may declare generally; *Brook v. White* (b); and it is to be observed that the doubt attributed to Lord *Alvanley* in *Dutton v. Solomonson*, is not entertained by any of the court in *Brook v. White*, the point being unanimously ruled the other way, *Chambre J.* saying that if any thing dropt from Lord *Alvanley* upon that subject, it was extrajudicial. In *Clark v. Gray* (c), Lord *Ellenborough* says there are a great variety of agreements not under seal, containing detailed provisions regulating prices of labour, rates of hire, times and manner of performance, &c. which are every day declared upon in the general form of a count for work and labour. The inconvenience of surprize, which is the only one chargeable against this form of action, may at all times be obviated without difficulty, by demanding a bill of particulars, or a statement of the party's claim.

Cur. adv. vult.

Upon this day the judges delivered their opinions.

TILGHMAN C. J. This cause comes before us on a writ of error to the Court of Common Pleas of *Dauphin* county. The plaintiff below declared upon an *indebitatus assumpsit* and *quantum meruit* for work and services performed by him for *James Foster* deceased. On the trial he proved, that he had lived with *James Foster* several years and performed services for him; he also proved a promise by *James Foster*, that if the plaintiff would live with him till the time of his death, he would give him 200*l.*, and that he did live with

(a) *Fitzgib.* 303.

(b) 4 *Bos. & Pul.* 330.

(c) 6 *East*, 569.

him. The court told the jury, that if they believed this evidence, the plaintiff was entitled to a verdict for 200*l.*, which the jury found accordingly, and the defendants took a bill of exceptions to the court's opinion.

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The strength of the objection lies in this, that the plaintiff ought not to have been permitted to avail himself of this special agreement without having stated it in his *Narr.* We have held this case under advisement since the last term, in order to have an opportunity of examining the authorities cited on the argument, many of which were not to be procured in this place. Upon a careful examination of the law it appears to me to be settled, that when the terms of a special agreement have been performed by the plaintiff, the law raises a duty, for which a general *indebitatus assumpsit* will lie. It is so laid down in *Buller's Nisi Prius* 139, and the case of *Gordon v. Martin, Fitzgibb.* 302, is cited in support of the principle. *Buller* is fully supported by the case referred to, which was a decision on the very point. The opinion of Justice *Dennison* is precisely the same in *Alcorn v. Westbrook,* 1 *Wils.* 117; and to the same purpose is the late case of *Brooke v. White, 4 Bos. & Pul.* 330. I am always glad to find authority for supporting the verdict of a jury where the merits appear to have been fairly before them, and for supporting that kind of pleading which is attended with the least difficulty. The only objection to this general manner of declaring is that the defendant may be taken by surprise; but with proper caution he never can; for he may demand of the plaintiff to specify the nature of the evidence he means to offer, and until this is done, the court will not suffer the plaintiff to bring on the trial. Something very like the present question was determined by this court in the case of *Snyder and wife v. Samuel Castor, administrator of George Castor,* at *Philadelphia March* term 1807. The plaintiff declared on a general *indebitatus assumpsit* for work labour and services &c., and gave in evidence a promise of the intestate to pay *after his death.* It was objected that this was a special promise, different from that laid in the declaration; but the court decided that the action might be supported, as it was not brought till after the time when the money was due. I am therefore of opinion that the judgment of the Court of Common Pleas be affirmed.

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YEATES J. The distinction is fully established in the cases cited by the Chief Justice, *Bull.* 139. *Fitzgib.* 302. 1 *Wils.* 117. 4 *Bos. & Pul.* 330, that an *indebitatus assumpsit* or *quantum meruit* will lie upon a special contract executed by the plaintiff; but on such contract to be performed in future, the plaintiff must declare on the special agreement. All the cases upon the subject were fully considered in *Snyder et ux. v. Castor's administrators*, and I mentioned that decision during the argument at the last term. The present suit appears to me to be the same in principle, and I cannot distinguish between them. It is the defendant's fault if he is surprized on the trial; because he may require of the plaintiff the particulars of his demand previous to the trial, and may come prepared to meet it. I concur in opinion that the judgment below may be affirmed.

BRACKENRIDGE J. It has occurred to me sometimes to consider whether the practice of our courts in this state, in bringing a matter to issue, will warrant the like strictness with the courts of *England*, in what shall be given in evidence.

I will premise that I think a great deal has been lost in permitting the practice that has taken place here, or a departure from what is called *special pleading*. There is not only great scientific beauty, but there is wonderful convenience for the attainment of justice in having the matter in controversy brought to a point, and on which the issue joined goes to the jury. It gives the party on the other side a clear and explicit view of what is to be proved or resisted on the trial. But independent of this, half the matters in controversy are determined before the issue is made up, or goes to a jury; this on demurrer &c.; or, if not determined, the controversy is so narrowed that a single question being to be tried, the necessity of calling witnesses is wonderfully reduced, and great expense saved. I take the want of having the leading point that is to be controverted in the cause specially brought to an issue, is a great cause of the delay of trials in our courts of justice. For in laying the evidence before the jury, there is the same process of attack and defence, as on paper in special pleading preparatory to the trial; the

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plaintiff makes out his allegation. The defendant goes on to prove something, which, admitting it, overthrows it. The plaintiff overthrows that by a supervenient fact, and the rejoinder, surrejoinder, rebutter, and surrebutter, are all gone through by the adduction of witnesses; which would have been rendered in some part unnecessary, if the parties had come to action first, knowing precisely the point at which they were to meet.

May there not therefore seem less reason where the pleadings are special, and made out in form, to indulge evidence of what is not specially alleged in the declaration; is not a party more likely to be surprized where that is expected, and not done? Certain it is, that in consequence of our practice, parties come more prepared to give in evidence all matters that relate to a transaction of which the declaration may lead them to have some knowledge, and are less likely to be surprized by the liberality of admitting testimony on somewhat broader ground than in the courts of *England*. But laying aside these considerations, in the case before us I would take it that even according to the *English* decisions, the evidence may be reconciled with the declaration, and the direction of the judge supported. I shall not take up the time of the court to go through the decisions on the subject of the variance alleged; though I have considered the bulk of them, and doubtless they have been carried to the utmost extent of technical strictness, in some late cases. I take that of *Mussen v. Price*, 4 *East* 147. where Lord *Ellenborough* said, "The only question was as to the form of declaring. There is no doubt but that the plaintiff might have recovered by bringing his action on the special contract. But the question is whether he has not also this remedy. And if it were not for the authority of the case cited before Justice *Chambers*, whose opinion is entitled to great weight, I should have thought he has. That was the leaning of my mind before I heard of the decision of the learned judge, and so must I own it is in some degree still; so that whatever respect I feel for the opinion, the present feeling of my mind is against it." His associates, however, thought otherwise; and *Le Blanc* concludes with observing, "that in all cases, without express authority to the contrary,

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"it is better to keep the forms of action as distinct as possible, instead of running one into another.

Lord *Alvanley* in *Dutton v. Solomonson*, 3 *Bos. & Pul.* 584. expresses himself thus, "I was at first inclined to hope that we might hold the plaintiff at liberty to recover on this general count, as if there had been no special agreement. These were the impressions on my mind, when the point was first started, and I should have been glad if the law would have warranted me in giving them effect. Indeed the same arguments seem to have weighed with Lord *Ellenborough* in the case of *Mussen v. Price*, who accordingly there delivered his opinion in favour of the plaintiff. Whatever doubts therefore I may have entertained, respecting the rule which ought to be adopted, I cannot set up my judgment against the decision of the King's Bench, which is precisely in point. If this matter had been *res integra*, I should have thought for myself; but the law being once settled, no material inconvenience can result from adhering to the rule which has been laid down."

But the case of *Cook v. Munstone*, 4 *Bos. & Pul.* 351. furnishes a still stronger instance of technical strictness in confining the recovery to the demand made. The declaration was for *soil or breeze*. The proof went to a contract for *breeze* only, and the plaintiff was nonsuited. He insisted to recover back, on a count for money had and received, the money he had advanced on the contract, but was not allowed. This is put on the ground of excluding "the practising surprize on defendants," and for the sake of the general principle, that if evidence is admitted other than what applies to the allegation of the declaration, where there is any material variance, it would be difficult to say where it should terminate. I am not about to say that I am dissatisfied with this principle, or prepared to say how the difficulty can be got over, even under our practice; but in the case which we have to consider, there cannot be said to be a material variance, between the contract laid in the first count, and that proved. The time of service agreed upon, was during the life of the person hiring, and 200*l.* the compensation to be devised to him, in other words paid to him after his decease. The count is 200*l.* for a length of service. It might have been more particular; but so far as it goes, it answers

the contract, and there is no variance. And the count is not more general, than the law allows in the statement of the consideration of a demand. On an *indebitatus*, it is not necessary to state particularly how the debt arose, or how it was to be paid; for that in many cases would involve the whole history of the contract. A generality of statement is allowable; and though the stating the agreement specially is preferable, yet a generality of statement has been admitted in precedent.

If we consider the first count in the case before us as a special count, and the evidence supporting it, it is not material that the second count is general; for the difficulty the courts have had, is where a special agreement is laid, and the evidence does not go to support it, but the general *indebitatus assumpsit* of another count; and even this is now settled that the evidence may be given. *Bul. N. P.* 139.

It would seem to me therefore, that with a little exercise of that *astutia* which the law will countenance in supporting the justice of a case against defect of form, we are able in this case to reconcile the judgment of the court below with the technical strictness which courts have thought necessary in stating a ground of action, to give the defendant reasonable notice of what is demanded; for that is the reason of the rule. Counts for money had and received have been allowed to such extent, that in most cases they give little or no information of the cause of action; while the generality of statement under the head of an *indebitatus assumpsit*, has been restrained with subtilty, and specification insisted on. The guarding against surprize is the principle; but where there is surprize, there is relief by application to the court to put off the trial, to withdraw a juror, or to grant a new trial. Where the surprize arises from a want of notice from the declaration, and where that has not been helped by a specification more particular, it cannot be possible that a court would refuse a new trial, and that perhaps at the costs of the plaintiff in some cases; but where there has not been in fact surprize, and it must be manifest that justice has been done, to reverse a judgment, and turn a party round to a new action, barred perhaps by the statute, is a hardship, and ought not to be, where a general rule can be

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substantially preserved, and the judgment supported. The forms of law do not make it a game of tric trac, a system of catches, nor is subtilty and discrimination useful, but to enable to reach the truth, and get at the justice of the case with certainty, and with despatch. A rule of law pushed to an extreme does not correspond with the intention of it; and applied to a case where the reason of it does not exist, works injustice, and a dissatisfaction with the administration of justice, under the technical form of systematic science. I am inclined in this case to affirm the judgment.

Judgment affirmed.

Sunbury,
Saturday,
July 8.

Lessee of JAMES against BETZ.

IN ERROR.

A patent is prima facie evidence of title, and of survey.

Riamey
2b 19
136 552

ERROR to the Common Pleas of *Northumberland* county.

Upon the trial of this cause, the plaintiff having given in evidence a patent from the land office, and also a diagram to illustrate the recital of courses and distances in the patent, offered a witness to prove that the diagram was accurate, and corresponded as well with the patent as with the lines on the ground. But it was objected that the *return of survey* under the seal of office, being the best evidence, ought to have been produced, and the lines on the ground shewn to correspond with the official survey returned into office. The Court accordingly sustained the objection, on the general principle, that the best evidence ought to be produced.

The plaintiff then offered a witness to prove that the lines on the ground corresponded with the courses and distances recited in the patent, and that the defendant lived within those lines. But the Court refused to admit the possession of the defendant to be thus proved, because the official return of survey was the best evidence, and might be had; because the recital in the patent was only a copy of that return, and an imperfect copy, as it did not contain the diagram; and because the official copy was the only evidence to prove the survey made by an authorized deputy surveyor. The plaintiff of course took a bill of exceptions.

Hall, for the plaintiff in error, argued that the patent was the best evidence of the survey, and in that light had been uniformly admitted, being an acceptance and confirmation of the survey by the owner of the soil; that the want of a diagram in the patent was of no importance, because in fact a diagram or draft could be, and could only be, made out from the written courses and distances in the patent; and that, instead of the official copy of the survey being the only evidence to prove the survey made by an authorized surveyor, the patent was not only *prima facie* evidence of that fact, but also that such deputy surveyor had acted therein lawfully and properly.

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D. Smith, for the defendant in error, was proceeding to argue, that the patent was not the best evidence of the survey, when the Court intimated to him that it had been considered as *settled*, that a patent was *prima facie* evidence of title and of survey. He therefore relinquished the argument, and

Per Curiam unanimously,

Judgment reversed, and *venire de novo* awarded.

FRENCH and another against M'ILHENNY.

Sunbury,
Saturday,
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THIS was an appeal from the decision of YEATES J. at a Circuit Court for *Dauphin*, in November 1805.

It was an action of covenant, in which judgment was entered by consent for the plaintiff, subject to the opinion of the Court upon a case which stated that "*Seth Rodgers*, being seised in his demesne as of fee, of and in a certain tract of land, situate in *West Hanover* township, *Dauphin* county, made his last will and testament in writing, dated October 3, 1757, in *hæc verba*; and as for such worldly estate, wherewith it has pleased God to bless me in this life, I

The testator,
"as for such
"worldly estate
"wherewith it
"had pleased
"God to bless
"him," be-
queathed the
same in part as
follows: "To
"his wife, one
"half of his
"plantation,
"during her
"natural life;
"to his nephew
"Seth two thirds of his *plantation*, excepting what was above to his wife already willed;
"also to his nephew Robert one third of his *plantation*, excepting what was above willed
"to his wife." Held that the nephews took a *fee simple* in the plantation, subject to the life estate of the wife in a moiety.

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"give, dispose, and bequeath the same in the following manner and form; *First, to Catherine Rodgers, my beloved wife, I bequeath the one half of all my moveables, as also her bed, and chest, and clothing, and the one half of my plantation during her natural life: Also, to my brother Hugh Rodgers the one half of my body clothes, and five pounds in money: Also, to my brother George Rodgers the other half of my body clothes, and five pounds in money: Also, to my nephew Robert Rodgers, son to said Hugh Rodgers, twenty five pounds, &c. &c. Also, to my nephew Seth Rodgers, two thirds of my plantation, excepting what is above to my wife already willed. Also, to my nephew Robert aforesaid, one third of my plantation, excepting also what is above willed to my wife.*" Then followed some legacies of no importance. The question submitted to the consideration of the Court was, whether an estate in fee simple in the whole of the said tract of land, vested in the said Seth and Robert, after the death of the testator's widow. If it did, then judgment for the plaintiff to stand; if it did not, that judgment to be set aside, and judgment to be entered for the defendant, with liberty to either party to appeal.

The case was argued below by the plaintiff's counsel alone, when his Honour decided in favour of the plaintiff, and the defendant appealed. It was argued here at last July term by Laird for the plaintiffs, and by Duncan for the defendant.

For the defendant. 1. Seth and Robert Rodgers took but an estate for life. 2. That estate is confined to one half the plantation, the other half to the wife being excepted.

1. The devisees took but an estate for life, because it is an established rule of law that express words of inheritance, or words tantamount, are necessary to pass an estate of inheritance; and that the heir at law is not to be disinherited by a doubtful construction. The decisions upon this head are without end; and they enforce the principle without a single exception, even in cases where privately there could not be a doubt, that the intention of the testator was thereby defeated. In *Right v. Sidebotham (a)*, where this rule is laid down, it appears that the words *tantamount* to words of inheritance,

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are such only as indicate the whole interest of the testator, and not such as are descriptive of local situation, or the kind of property. "All my lands in B.," "all my farms," are descriptive of situation and kind; "my estate," "all my interest," on the other hand, are descriptive of interest: the latter will pass a fee, the former but an estate for life. Now, there is no difference either in legal or vulgar acceptance between "farm" and "plantation," nor has it ever been held, that either term, any more than that of "house," was descriptive of interest. It is true, that sometimes the context of the will is allowed to extend a devise beyond an estate for life; but there is nothing in this will that can properly have that influence. The first clause, "as to all my worldly estate," &c. certainly has no such effect. In *Right v. Sidebotham*, in *Denn v. Gaskin (a)*, in *Roe v. Bolton (b)*, and in many other cases, where that clause is found, the devisee took but an estate for life. They are words of course in wills, and are never meant to relate to the quantity of interest given in the thing devised. There is also a devise to the wife for *life*, which may be said to indicate an intention to give a fee where the same limit is not affixed to the estate. But this was precisely the case in *Roe v. Bolton*, which, in several particulars, is almost in point to the present. There the will contained the introductory words, "as touching such worldly estate," &c. The testator then gave all his real and personal estate to his wife for *life*, and afterwards made the devise in question. "Item, I give unto my son Paul Cardale all that my land, lying and being in the parish of *Dudley*, in the county of *Worcester*, near unto a certain place called *Finsley Hill*, into three parts divided, at or immediately after my wife's decease." There was also a legacy of five shillings to the heir at law; but *Paul Cardale* took only an estate for life. In fact, the cases in which a fee has passed without words of perpetuity, are either where a word has been used indicating the entire interest, as "estate," or where the devisee has been directed to pay a rent charge, or other solid sum out of the property devised. *Denn v. Mellor (c)*. The Court may conjecture that a fee was intended by the testator, "but *quod voluit non*

(a) *Cowp.* 657.(b) *Doug.* 732.(c) 5 *D. & E.* 562.

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"*dixit*," and they are bound to consider the series of authorities which reject these private conjectures, and set up permanent rules of construction in their place, as the law of the land. The anonymous case in 3 *Dall.* 477, turns upon the peculiar nature of an improvement under warrant in 1745. The testator, by a will of that date, devised the improvement whereon he lived to his son *James*; and it was held to pass a fee. But it is well known that in 1745 such an improvement was considered, and taken in execution, as personal property; whereas the testator in this case held under a patent, which has always been deemed an absolute legal estate in fee simple.

2. The devise passes only two thirds, and one third, of the moiety not devised to the wife. It is not a devise of the whole, subject to a prior devise of part; but it is a devise excepting a part which had been previously devised. The moiety therefore went to the heir at law upon the wife's death, and judgment should be entered for the defendant.

For the plaintiffs. The intention of the testator is to be gathered from the whole will; and although each of the peculiarities of this will may have separately occurred in cases where the devisee has taken but an estate for life, yet together they must be considered as tantamount to words of inheritance. The testator meant to devise every thing; when he intended to give but an estate for life, he did it in express terms; and when he made an exception out of the whole plantation devised to the nephews, it was an exception of the wife's life in a moiety, and nothing more. The first circumstance has always been allowed great weight in the construction of the quantity of interest subsequently devised; for after such a beginning the testator must intend to dispose of the fee. The next circumstance shews, that in the case of the nephews, he did intend a fee, because had he meant a life estate he would have copied the devise to the wife. And the third shews, that as one exception to the extent of their devise is provided for, both as to quantity of land, and duration of estate, namely, a moiety for the wife's life, no other exception in either particular was intended. Altogether they establish an intention to give a fee. The case of *Fletcher v. Smiton (a)*, shews the effect of using restrictive words in a

(a) 2 D. & E. 656.

former part of the will, and dropping them afterwards. *Grose* *J.* says, "where the deviser intended to confine the operation of the word "*estates*," he added "*for life*;" but in the latter clause there are no words of restraint added." So here, where he intended to confine the operation of the word "plantation," which he thought would pass every thing, and which is fully as descriptive of interest as "*estates*," he added "*for life*;" but in the devise to the nephews there are no words of restraint. In *Loveacres v. Blight* (a), the Court say, although the introductory clause is not alone sufficient, yet it is a strong circumstance connected with other words to explain the testator's intention of enlarging a particular estate, or of passing a fee where he has used no words of limitation; and by the aid of that, and some other circumstances of no great weight, they held a fee to pass by a devise of all his lands to his two sons, freely to be enjoyed and possessed alike. In fact, as Lord *Mansfield* says in that case, the question is always a question of construction, and depends upon observations naturally arising out of the will itself. Now, can there be a doubt, if we resort to these observations, that the testator intended a fee? In universal understanding the plantation is the *estate*, it is the whole interest; and although, by arbitrary decisions heretofore, a devise of the plantation may, standing by itself, pass but a life estate, yet there is no decision that, with the other circumstances of this will, it would not pass a fee. The case is stronger than *Tanner v. Price* (b), *Barry v. Edgeworth* (c), or *Lambert's Lessee v. Pain* (d), in each of which the devise passed a fee. In *Right v. Sidebotham*, the testator had before given the same devisee a fee in other lands by technical words, which he omitted in the devise in question; and in *Denn v. Mellor*, both the introductory clause, and the express devise for life were wanting.

2. About the proportion devised there can be little doubt. It is a devise of the plantation, that is the fee, excepting out of it a life estate in a moiety. Half of the land for a life in being, is excepted out of the whole land in fee simple; which, in other words, is an immediate devise of a

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(a) *Cowp.* 352.(b) 3 *P. Wms.* 295.(c) 2 *P. Wms.* 523.(d) 3 *Cranch* 97.

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moiety in fee, and the reversion of the other moiety after the wife's death.

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M'ILHENNY.

Cur. adv. vult.

Upon this day the judges delivered their opinions.

TILGHMAN C. J. This case arises on the will of *Seth Rodgers*, made the 3d October 1757; and the question is, whether the testator's nephews took an estate in fee simple in the land devised to them.

At the time of the argument of this cause in the Circuit Court of *Dauphin* county, it was supposed that the testator held the land only by *warrant* and survey, and it is probable that the court relied on that circumstance. Titles of this kind were formerly considered as *personal* estate; and accordingly it was decided in an anonymous case reported in 3 *Dall.* 477, that a devise to a man's son of the "improvement whereon the testator lived," without other words, passed a fee simple, because the land was held by *warrant* only. According to the most accurate account I have been able to obtain, it was about the year 1758, that these equitable titles began first to be considered as *real* estate. It is now however ascertained that the land in question was held by patent by *Seth Rodgers* at the time he made his will. It is therefore the common case of a devise by a person seised of the legal estate in fee simple.

The testator begins his will with the usual introductory clause, "as for such worldly estate wherewith it has pleased "God to bless me in this life, I give, dispose and bequeath "the same in the following manner." He then gives his wife one half of his plantation during her natural life; and then, after giving several legacies, comes the devise to his nephews in the following words. "Also to my nephew *Seth Rodgers* two thirds of my plantation, excepting what is "above to my wife already willed. Also to my nephew "*Robert* aforesaid, one third of my plantation, excepting also "what is above willed to my wife." After this follow legacies of money to several persons which it appears by the expressions of the will, the testator intended to include the whole of his personal estate.

If I was at liberty to indulge my own conjectures, I should think it probable that the testator intended to give a fee

simple to his nephews. But as this is only a conjecture, I know not how to get over a principle which seems well established, viz. that the inheritance shall not be taken from the heir, unless the devise contains either proper words to create a fee simple, (to the devisee and his heirs) or words which have been construed as tantamount, as to the devisee *for ever*, or all his *estate* in the land to the devisee; or unless in some other part of the will an intent is manifested inconsistent with a less estate than a fee simple, as if the devisee is directed to pay a sum of money to a third person. Now there are no words of that kind in this will. It is a simple devise of a *plantation*, excepting what had been given to the wife, which as much as to say, subject to the devise of one half of the said plantation before made to the wife for life.

There are indeed the introductory words, shewing an intention to dispose of all the estate; but although such words have been relied on, in conjunction with others, yet they have not of themselves the force to give a fee simple. The last case adjudged in *England*, which is an authority upon this subject, is *Mudge's Lessee v. Blight*, in the year 1775. *Cowp.* 352. Lord *Mansfield* in delivering his opinion, declares, that where there are no words of limitation, the devisee can take only for life, because the principle is fully settled, and no conjecture of a private imagination can shake a rule of law. If the intent is doubtful, the rule must take place; so must it, if the Court cannot find words to carry a fee, though they have no doubt of the intent. Introductory words alone, will not do. The opinion of Lord *Mansfield* is entitled to great weight, because the liberality of his mind in general, and his strong inclination to carry the testator's intent into effect without regard to form, is well known. Subsequent decisions in *England*, though not to be regarded as authority, shew that the opinion just recited is still considered as law there. In *Mitchell's Lessee v. Sidebotham*, *Doug.* 730. the testator devised "all his lands, tenements, and houses in the parish of C.," the will had the introductory words sometimes relied on, and a devise of one shilling to the heir at law, which was certainly a strong circumstance to shew that it was intended the heir should have nothing but a shilling; but it was determined that the devisee took

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only an estate for life. In the *Lessee of Gaskin v. Gaskin, Cowp. 657*, there was the same decision, although there were the introductory words, a devise of one shilling to the heir, and a devise of all the residue of the *personal* estate. In this case, Justice *Aston* cited *Wright, Lessee of Shaw v. Russel*, determined in the exchequer in 1761. After the introductory words, there was a devise of a *house* to testator's grandson A. and after his decease to his two sons B. and C., and a devise of one shilling to the husband of the heir at law; held, that B. and C. took only for life. In *Moor's Lessee v. Mellor, 2 Bos. & Pul. 247. and 5 D. & E. 558*, the same principle was decided by the court of King's Bench, and affirmed on a writ of error in the house of lords. I think the principle of not disinheriting the *heir* without sufficient words, ought if possible to be more strictly observed here than in *England*; because there the *eldest* son is the heir, but here the law is more equitable, and all the children together are considered as heirs.

The case of *Lambert's Lessee v. Paine, 3 Cranch 97*. decided by the Supreme Court of the *United States*, was cited on the argument of this case. It was a devise of "all the estate called *Marrowbone* in the county of *Henry* containing by estimation 2500 acres." Three judges, against Judge *Washington*, held that the devisee took a fee. This opinion was founded solely on the import of the word *estate*, which has been held to refer not only to the local situation of the land, but to the *interest* which the testator had in it. The word *plantation* never was construed in that sense; and it is worthy of remark that Judge *Patterson*, in giving his opinion in *Lambert v. Paine*, thus expresses himself: "some expressions in a will, as I give my farm, my *plantation*, my house, my land, do of themselves contain no more than a description of the *thing*, and carry only an estate for life." On the same principle (the import of the word *estate*) was decided the case of *Wilson v. Wilson*, before Judge *Yeates* at the Circuit Court of *Dauphin* county, *September 1805*. The testator devised "all his real estate" to his five nephews, each share and share alike.

In considering the case now before us, I confess it was my wish to find words which might authorize the opinion

that the testator's nephews *Seth* and *Robert Rodgers* took an estate in fee; but I can find no words which can be so construed, without breaking down an established principle, and thus opening a door for uncertainty and confusion. I am therefore of opinion that they took no more than an estate for life in the land devised to them, and that the judgment of the Circuit Court be reversed.

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BRACKENRIDGE J. stated the material devises, and then proceeded as follows:

Were we at liberty to construe the above words as we would construe the words of any other writing, no doubt could be entertained but that the testator by giving the plantation, or giving any part of it, intended that gift to be to the extent of the interest he had in it. Because such is the meaning and acceptation of the terms, in conversation and in writing. It would be so understood by the people. But it will be said we are not at liberty to construe a will, according to the common meaning of the words; but according to the technical acceptation of the terms.

It is a maxim, that the intention of the testator shall prevail; yet that must be consistent not only with the rules of law as to the extent of his gift, but with the rules of construction as to what he does give. This restraint upon alienation by devise, was unknown to the *Roman* law, and had no place in our law with regard to devises of goods and chattels. It would seem to have come from the strictness of the common law conveyance, the courts going a certain length in applying the rules of construction in one case to the other; not so far as to say "that words of inheritance shall be necessary to give a fee, or words of procreation an estate tail," 2 *Black. Com.* 381.; yet so far as to say, that the popular acceptation of a term shall give way to technical construction, however inconsistent this with what is laid down by the same writer, in the same place, "that a devise be favourably expounded to pursue if possible the will of the devisor, who for want of advice or learning may have omitted the proper or legal phrases."

In *Perrin v. Blake*, Lord *Mansfield* observes, "that as the law allows a free communication of intention to the testator, it would be a strange law to say, now you have com-

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"municated that intention so as every body understands what you mean, yet because you have not used a certain expression of art, we will cross your intention, and give your will a different construction, though what you mean to have done is perfectly legal; the only reason for contravening you, is because you have not expressed yourself as a lawyer." Yet on a writ of error in the exchequer chamber the contrary doctrine prevailed; and it was held to be the principle, "that the testator shall be permitted to fulfil his intention, so far as such construction is consistent with the established rules of construction." *Collec. Jur.* 229.

The inconsistency of this principle with that of "serving the intention" was such, that from an early period we find the courts giving a meaning to *terms* in support of the intention, which they technically had not before that time; as that the word *estate* shall be construed to give a fee; "that it shall be understood to comprehend, not only the thing, but the interest in it." 2 *Peere Will.* 524. So in 3 *Peere Will.* 295, where *temporal* estate is said to mean *worldly* estate, and the *rest of my estate*, temporal estate, which without the word heirs would have sufficed to pass a fee. And in 1 *Wilson* 333, after the introductory words, "all my temporal estate," a devise of "all the rest of my goods and chattels, real and personal, moveable and immoveable, as houses, gardens, tenements," without making use of the word *estate*, or any words of limitation, was held to give a fee.

In *Brown v. Taylor*, 1 *Burrows* 270, the word *legacy* by relation is construed to carry land. Lord *Mansfield* says "this is plainly a will of the man's own drawing. The explanation of the word *legacy*, must be governed by the intention of the testator; and to this purpose some stress may be laid upon this introduction of the professed disposition of all his 'worldly estate.' Common people do not make a distinction between money and land."

Yet in the case of *Mitchell v. Sidebotham*, *Doug.* 730, this freedom of thinking would seem to have been restrained somewhat; for in this case, which was, "I give and bequeath to A. all my lands at C," it was held that an estate for life only was given, notwithstanding the introductory words, "for those worldly goods and estate with which it has

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“pleased God to bless me.” “I verily believe,” says Lord
Mansfield, “that in almost every case, where by law a general
 “devise of lands is reduced to an estate for life, the intent of
 “the testator is thwarted; for ordinary people do not distin-
 “guish between real and personal property. The rule of law
 “however, is established and certain, that express words of
 “limitation, or words tantamount, are necessary to pass an es-
 “tate of inheritance. ‘All my estate’ or ‘all my interest’ will
 “do: but ‘all my lands lying in such a place,’ is not sufficient.
 “Such words are considered descriptive merely of the local
 “situation, and only carry an estate for life. Nor are words
 “tending to disinherit the heir at law sufficient to prevent his
 “taking, unless the estate is given to somebody else.” In
Hogan v. Jackson, Cowp. 307, he again admits this rule of
 construction, which by analogy to the law of conveyance
 would seem to have been adopted to some extent in the con-
 struction of devises; but he shews an astutia in giving a techni-
 cal meaning to popular language in order to support the in-
 tention. It may be worth while to give his words at some
 length. “The law of *England* formerly admitted of no tes-
 tamentary dispositions of *real* property. This restriction
 “took place on the introduction of military tenures, and was
 “a branch of the feudal doctrine of non-alienation without
 “the consent of the Lord. But when the rigor of the re-
 “striction became by degrees to be relaxed, and tenants were
 “permitted to make dispositions by testament, a devise of
 “land operated as an appointment to uses, in nature of a
 “legal conveyance. As such, the courts of law in the con-
 “struction of them, held, that a devise affecting lands could
 “operate only on such real estates as the testator had at the
 “time of executing and publishing his will, and not upon
 “any after purchased or acquired lands; because there
 “could be no legal conveyance at common law of what a
 “man should acquire in future. Another distinction, found-
 “ed upon the notion that a will affecting lands is merely a
 “species of conveyance, and derived from the same source,
 “is this. The law of *England*, in the conveyance of real
 “estates, requires words of limitation in the donation or
 “grant, to the creation of a fee. Without the word *heirs*,
 “general or special, no man can create a fee at common law
 “by conveyance. When wills therefore were introduced,

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“and devises of real property began to prevail, being considered as a species of conveyance, they were to be governed by the same rule. Therefore, by analogy to that rule, in the construction of devises, if there be no words of limitation added, nor words of perpetuity annexed, which have been held tantamount, so as to denote the intention of the testator to convey the inheritance to the devisee, he can only take an estate for life. For instance, if a testator by his will says, I give my lands, or such and such lands to A.; if no words of limitation are added, A. has only an estate for life. Generally speaking, no common person has the smallest idea of any difference between giving a person a horse and a quantity of land. Common sense alone could never teach a man the difference; but the distinction now clearly established, is this, if the words of the testator denote only a *description* of the *specific estate* or *lands* devised, in that case, if no words of limitation are added, the devisee has only an estate for *life*. But if the words denote the *quantum* of *interest* or property that the testator has in the lands devised, there, the *whole* extent of such his *interest* passes by his gift to the devisee. The question therefore, is always a question of construction, upon the words and terms used by the testator. It is now clearly settled, that the words ‘*all his estate*’ will pass *every thing* a man has: but if the word ‘*all*’ is coupled with the word ‘*personal*’ or a *local description*, there, the gift will pass only personalty, or the specific estate particularly described.”

In *Fletcher v. Smiton*, 2 Term Rep. 656. it was determined that the word *estates* in a will, carries a fee, unless coupled with other words which shew a different intention. Lord *Kenyon* says, “there are cases in which *nice distinctions* have been taken between a devise of an estate *at* such a place, and a devise of an estate *in* a particular place; and Lord *Hardwicke* alluded to it in the case cited from *Vesey*; but he added, that there is no case in which it was held that a fee passed by the devise of an *estate*, if the testator added to it, ‘in the occupation of any particular tenant.’ And I admit that the word ‘*estate*’ may be so coupled with other words as to explain the general sense in which it would otherwise be taken, and to confine it to mean

"*farms and tenements*. The word 'estates' has been held equivalent to 'estate,' unless other words be added to express a different intention. In the case of *Tilley v. Simpson*, in the Court of Chancery, *E. 1746*, Lord *Hardwicke* said, it would be productive of bad consequences to confine the devise to a chattel interest, unless there were other words to shew that it was so intended to be restrained."

Buller J.—"This is a question merely on the intention of the testator; and I think it is apparent, on reading the whole, that it was his intention that every thing he had, should pass by it." *Grose J.*—"Where the devisor intended to confine the operation of the word 'estates,' he added, 'for life:' but in the latter clause there are no words of restraint added."

In a note to this case, we find a reference to that of *Tilley v. Simpson* in Chancery, *Easter 1746*. The testator, after declaring that he intended to dispose of all his worldly estate, and making several devises to different persons, gave and bequeathed all the *rest and residue* of his money, goods, chattels and estate whatsoever to his nephew *A. B.* The question was, whether a beneficial interest in a real estate not before disposed of, would pass to the nephew by this devise. Lord *Hardwicke* chancellor, was of opinion that it would. He said, "where the court have restrained the word *estate* to carry personal estate only, hath been where it hath appeared that it was the intention of the testator it should be so understood."

Yet in *Moor v. Mellor*, 5 *T. R.* 559, where the devise was "all the rest of my lands and tenements," it was determined that but an estate for life passed. Lord *Kenyon* said, "had there not been such a current of authorities as we find in the books, since the passing of the statute of wills, to further (as it has been called) the intention of the testator, perhaps it would have been better if the same strict words had been required in testamentary dispositions of land as in those by deed; because then the language of passing estates would have been so familiar that few questions would have arisen on wills. For it has been often observed, that few questions arise on the construction of deeds, when compared to those which daily arise on wills. But we are bound to consider the series of authorities on this subject

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"as the law of the land; and it would be extremely dangerous, now, to remove those landmarks of real property, on which mankind have acted for such a length of time. In many of the cases that have been litigated, and in which it has been decided that the first devisee was only entitled to a life estate, one cannot but suspect, privately speaking, that it was the intention of the deviser to give the absolute property to the first taker; and Lord *Mansfield* used to observe that the common class of men imagined that they could give a fee simple by the same words that are sufficient to give a piece of plate. But the contrary of such a supposition has now been decided by so many authorities, that it would be dangerous to shake them; and in deciding on the construction of wills, we must not indulge in conjectures or wishes, but determine on the words used according to those authorities. Where the word 'estate' has occurred, that word has been held *ex vi termini* to pass a fee. The courts indeed have gone as far as they could, to give the absolute interest to the first devisee: but there are certain limits which they have put upon their construction of wills, and we must take care not to transgress them. Privately speaking, I think the deviser meant to give an estate in fee to his wife, but we are compelled by the authorities to say that she only took an estate for life."

Grose J.—"In the construction of wills, we must be guided by those rules which we find established in former cases. And one rule is clear, that the heir at law is not to be disinherited, unless the deviser's intention to disinherit him can be collected from the words of the will. What is a sufficient proof of that intention, is not indeed accurately defined, as applicable to every case that may arise: but there are some rules laid down upon this subject, to which we are bound to adhere; and one of them is, that if a man give his house to A. without other words, it is only a devise for life, whatever may be our conjecture of the deviser's intention. On the authority of the cases alluded to, I am compelled to say that in this case the widow took only an estate for life."

In *Palmer v. Richards*, 3 T. R. 356, Lord *Kenyon* says,—"the court will not anxiously seek for words to disinherit the heir at law, though they will endeavour to give effect to the intention of the testator. No person who reads this

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"will, except a lawyer, can have any doubt on the meaning of it." *Buller J.*—"There is hardly any case of this sort, where only an estate for life is held to pass, but that it counteracts the testator's intention. For where a testator uses general words, he means to dispose of every thing he has. But such is the rule of law, that unless some words are used which the law considers sufficient to carry a fee, the devisee can only take an estate for life, though indeed slight expressions are sufficient to pass the inheritance, where the Court thinks that such is the deviser's intention. No technical words are necessary in a will to give a fee; but if any words are inserted to effectuate which it is necessary that a fee should pass, that is sufficient."

In *Childwife v. Wright and others*, 8 T. R. 67, there was a devise of all estate, lands, &c. lying and being, &c. Lord *Kenyon* observes that "it has been frequently lamented that the same technical words were not required in wills as in deeds; because had such a rule been adopted, few questions would have arisen on the construction of wills. Certain rules have been adopted by which the real property of this country has been governed for ages, and it would be too much for us now to overthrow them. I am therefore of opinion that *J. W.* only took an estate for life." And *Ashhurst J.* remarks that "it is better for the public that the intention of one individual should be defeated, than a series of decisions on which the property of this country depends should be shaken. *Stare decisis* is a maxim in our law. Where there is a general devise of lands without any words of inheritance, the law says the devisee shall only take an estate for life, and such is the present case."

I would ask whether it has not been as much lamented, or at least as lamentable, that the maxim of *debet intentioni servire* had ever been broken in upon in the case of wills, by introducing the idea of a technical construction; and whether that has not been the cause of the uncertainty. That the compound construction of the common acceptance of terms, and the technical meaning, has been the cause of uncertainty, no one can doubt. In 2 *Peere Will.* 741, in the argument of *Mr. Joseph Jekyl* as master of the rolls, we have these observations: "I am sensible there is a diversity of opinions

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“ among the learned judges of the present time, whether the legal operation of words in a will, or the intent of the testator, should prevail? For my part, I shall always contend for the intention where it is plain, and I think the strongest authorities are on that side; for if the intention is sometimes to govern, as it is admitted it must, and not always give way to the legal construction, and yet at other times shall not govern, there will then be no rule to judge by, nor will any lawyer know how to advise his client; a mischief which judges ought to prevent.”

The same question arising from the same will, where the same plaintiff was defendant, was argued and decided in the Court of Common Pleas, seven years afterwards, and is reported 1 *Bos. & Pul. N. S.* 342, where sir *James Mansfield* expresses himself thus: “ This case has been long depending, not so much on account of any doubts entertained by my brothers, as by myself, the rest of the Court being of opinion that the defendant is entitled to judgment; and though I now defer to the opinion of my brothers and the judges of the Court of King’s Bench, yet I must declare that if it had fallen to my lot only to decide the case, I should have decided it in favour of the lessor of the plaintiff. Though I am bound therefore to say that this is still my opinion, yet I entertain it with great doubts of its solidity. Many cases have been cited, on which it would be wasting time to observe. My brother *Heath*, indeed, has furnished me with a case which is stronger than any, but to which I never could have agreed. In almost all the cases where questions of this sort have arisen, it has been next to impossible, out of a court of justice, to doubt of the testator’s intention to give the thing absolutely to the devisee. When a man gives a house, he supposes that he gives it in the same manner as he gives a personal chattel. On the other hand, it may be said, that as the common sense of mankind proves the intention to give an absolute estate, particular circumstances indicating such intention cannot prove it more strongly than the general devise; and that nothing therefore ought to be relied upon but express words in the will. And this certainly is the safest side; for it cannot be denied that where wills are interpreted on the force of particular circum-

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“stances, indicating particular intentions, decisions so
 “founded are more likely to lead to litigation than those
 “which are founded upon adherence to the general rule,
 “that unless there be express words of limitation, or some-
 “thing which renders it necessary to give an estate of inher-
 “ritance, the heir at law shall not be disinherited. Whenever
 “a case is decided on circumstances, others, who are to
 “judge afterwards, may receive a different impression from
 “the same case; whereas the adherence to a general rule is
 “more calculated to avoid uncertainty. I am bound to think
 “that the opinion of my brothers is founded on more solid
 “grounds than mine.”

The weight of seven judges against him, the four judges
 of the Court of King's Bench, in the case before determined,
 and his three associates in the Court of Common Pleas, in
 the present case, led him to concede this; but I think the
 time not far distant, when even in those courts the rule will
 be otherwise. The sense which would strike the common
 mind generally, will be the test of the meaning.

In *Burnsall v. Davy*, 1 Bos. & Pul. Chief Justice Eyre,
 says, “Technical rules are not to be relied on in explaining
 “the intention of testators, and yet *cases of intention are*
 “*much embarrassed by authorities.*” But in *Moor v. Mellor*,
 2 Bos. & Pul. 250, M'Donald, Chief Baron, who delivered
 the opinion of the judges in *camera procerum*, lays it down,
 “that in order to preserve uniformity, and consequently
 “security, in administering the law of real property devised
 “by will, it is necessary that the sense which has been put
 “upon particular modes of expression should be adhered to.”

In *Braidon v. Page*, in a note to 1 Bos. & Pul. 261, Lord
Mansfield is reported to have said, “that there is hardly an
 “instance, where the words of a devise are restrained to a
 “life estate only, in which the intention of the testator is
 “not contravened; for common men are ignorant of the
 “difference between land and money. This being so, the
 “courts have been astute to find out if possible from other
 “parts of the will, the intention of the testator.” And in the
 case to which this is a note, Chief Justice Eyre says, “I
 “think that we do not want the authority of cases at this
 “time of day, to establish the rule of law, that in the con-
 “struction of a will, whether the words used be technical or

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"not technical, or even of vulgar and common parlance, the court is to put that sense upon them, in which, on a fair consideration of the whole context, they collect that the testator intended to use them."

But to come nearer home, I extract the note of Judge Tucker to his 2 *Black. Com.* where he quotes *Pendleton* President, as follows: "that the intention of the testator is to give the rule of construction, is declared by all the judges both ancient and modern; but the judges, after laying down the true rule built upon intention, unfortunately admitted that if there were no words of limitation, the common law rule must prevail; by which they tied a gordian knot, which they have struggled to untie. *It would have been better to have cut it at once.*"

What has been the doctrine on this head in the state of *Pennsylvania*? From the case in 3 *Dall.* 477, the devise was to "my son *James* the improvement whereon I now live." The premises were held by warrant; and the only question was, whether an estate for life or in fee vested in the testator's son *James* by the devise. The court decided that the devisee took an estate in fee. This decision is under the year 1798, and in the Supreme Court. The will under which the lessor of the plaintiff claimed, is stated to be of the 8th of *October 1745*. Whether this decision was on the ground of considering the subject of the devise real property, or but a chattel interest, does not appear; though how it could be considered otherwise than as real estate, though with but an equitable title, I do not know. A bare *improvement* might have been considered as a chattel interest at a certain period, and I believe was by some, so that an inquisition was not necessary to condemn; but I do not know that any idea of this kind prevailed, where there was the inception of an office right. Be that as it may, *I am prepared to go the whole length of declaring independence of the decisions of the English courts, subjecting the construction of a will to technical rules.*

In this case however it may not be necessary, if the technical construction will support the intention of the testator. There is left to the widow one half of the plantation *during her natural life*; to *Seth* two thirds of the plantation, except what is above to the wife already willed; and to *Robert* one third, &c. This must be a *remainder* of at least one half of

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the plantation. Will not such a devise in remainder carry a fee? According to *Wallace v. Jackson*, Cowper 290, on a devise of lands to the mother during her natural life, and after legacies and annuities to the heir at law and to several relations, a devise to the mother of "all the remainder and residue of all his effects real and personal," the mother took a fee simple by this residuary clause, in all the testator's fee simple estates. It must be admitted there was a technical term in this case, *effects*, which had been holden to be equivalent to estate, and to carry a fee; and also the words "remainder" and "residue;" and the stress of the decision in favour of the widow is laid upon these words.

But it seems to be a rule, of even technical construction, that if it can be collected from the words of the will, what were the ideas of the testator with regard to the effect of the terms used by him, that sense shall prevail.

In *Bowes v. Blacket*, Cowp. 239, Lord Mansfield agrees that "if from the whole of the will taken together, and applied to the subject matter of the devise, it can be found that the testator's intention was to give a fee, it has been very properly and very truly admitted at the bar, that it ought to be so construed as to give effect to such intention." Now it is clear from the limitation to the widow during her natural life, that he had conceived that but for this, the giving one half of the plantation would have carried a fee of that half. Independent therefore of the ordinary use of language, there is here evidence, *ex visceribus testamenti*, of the extent and meaning affixed in the mind of the testator to the devise of a plantation. It follows, by necessary implication from the qualification, that he thought, that by giving a plantation, without saying more, he would give a fee. It may seem, therefore, that we have at least some countenance from the rules of technical construction, and that we are not altogether without legal help in eliciting the testator's intention in this case. At a dead lift therefore, I think this may do: and that without infringing on the doctrine of the *cabala* in substance, we may say that, by the word *plantation* a fee under this will may pass, since the *expressio unius*, natural life, *est inclusio alterius*, which must be something more; and if any thing more, it cannot be less than a fee.

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I should be much better satisfied to go back at once, and begin where the courts have gone wrong, and to take the meaning of a will as I would that of any other writing. It will not bear examination to say, that this will lead to controversy; or if it did, how does it reconcile contradiction, *to say that intention shall govern, and yet set it aside*. It is inconsistent with the nature of the case to suppose, that a man *in extremis* can have the benefit of legal assistance, or that in ordinary cases, where he does not call for it, he ever thinks of legal terms or the want of them; he uses the words of common language, and ought to be so understood. Courts will differ about the meaning and effect of a legal term, and there is a much greater chance of a concurrence of opinion on the popular import of a word.

I am confident there will be a beginning some time of emancipation from this affectation of mystery, in a science which has its foundation in reason and common sense.

As to estates having passed under this or that will, and the decisions thereupon, let what has taken place stand; why should it affect wills yet to be construed, or yet to be made? And this is the only consideration that can stand in the way, or can constitute an impediment.

In the case before us the particular estate hewn out of the whole, *the one half of the plantation to the wife during her natural life*, and the devise of two thirds to *Seth*, and one third to *Robert, excepting what was devised to the wife*, implies a devise *of all but what is excepted*, and this is a fee simple in the whole after the expiration of the life estate. On the breaking of this case, and on the argument, I was inclined to think that on the decisions of the *English* courts, there was but a life estate by the words of the devise; but of the intention I had no doubt; and with a willingness to support the intention, I may perhaps have gone farther than the strictness of technical construction in the *English* courts may warrant. But upon the whole, in support of the intention in this case, I will venture to give judgment for the plaintiff.

The Court being thus divided in opinion, Mr. *Duncan* for the defendant observed, that judgment could not be entered for the plaintiffs unless a majority of the court concurred therein; the judgment in the Circuit Court having been

entered by consent, without prejudice, and without even hearing an argument on the part of the defendant.

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YEATES J. thereupon said, that he thought the case had come up by appeal from the opinion he had delivered, though the defendant's counsel had not argued the case. But if any misunderstanding prevailed on that point, he had no hesitation in declaring that he adhered to the opinion he had formerly given. The introductory words in the will he looked upon as a *strong* circumstance, when aided by the *manner* in which the testator had devised his plantation. When he meant to give an estate for life therein, he expressly said so; and his silence as to the extent of the estate devised to his two nephews, evinced that he meant to give them an estate in fee simple, as fully and absolutely as he himself held it. Judging on the whole of the will, he apprehended that the intention of the testator might be fairly collected from thence to give his nephews an estate of inheritance in his plantation, without infringing the settled rules of construction of wills, which had obtained either here or in the *English* courts.

Judgment affirmed.

BROWN *against* BARNETT.

IN ERROR.

Sunbury,
Saturday,
July 8.

ERROR to the Common Pleas of *Dauphin* county.

In this case the plaintiff assigned for error that issue was not joined below; the plea being "payment with leave to give the special matter in evidence," to which there was no replication, nor was there the usual clerical memorandum on the docquet, "and issue."

When the words
"and issue,"
are inserted
upon the doc-
quet after the
entry of an is-
suable plea, it is
considered as a
direction to the
clerk to join the
issue, and the
omission of it
is treated, after
error brought,
as a clerical mis-
take. But if the

TILGHMAN C. J. It appears by the record that *payment* was pleaded, with leave to give the special matter in evi-

issue is not formally joined, and the memorandum is not made upon the docquet, the judgment is erroneous.

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dence, but there is no mention of the issue being joined. I am always sorry to reverse a judgment after a trial of the merits; and the case has therefore been held under consideration since the last term, to search for precedents. No case however has been found to warrant a judgment of affirmance. The farthest that the Court has gone, was in the case of *Myer v. Herring*, determined at *Philadelphia* in *December 1806*. That was an action of covenant. The plaintiff assigned breaches in his declaration, the defendant pleaded covenants performed and *non damnificatus*, and after that the words "*and issues*," were entered on the docket. It was decided that this was sufficient, because the mention of *issues* was tantamount to a direction to the clerk to join the issues, and the not doing of it was in the nature of a clerical omission. I should have been extremely glad if the entry had been the same in this case; but some principle must be adhered to, least in an attempt to do justice in a particular case, we do a public injury, by taking away all certainty. I am of opinion that the judgment must be reversed.

YEATES J. Of the same opinion.

BRACKENRIDGE J. Of the same opinion.

Judgment reversed.

2b 34
141 323

Sunbury,
Saturday,
July 8.

BROWN against LAMBERTON.

IN ERROR.

ERROR to the Common Pleas of *Cumberland county*.

In an action of slander, it is enough if it be substantially alleged that the words were spoken of the plaintiff; an express averment of that fact is not necessary. To say of a married man "he played with *Mary Parkinson* in a fother *rooms*, and *Robert* the second son of *Parkinson* belongs to" the plaintiff, is actionable.

The declaration, which contained but one count, stated, that whereas *William Brown* the plaintiff was an upright and virtuous man, and was married and had a wife in full life, yet the defendant *Simon Lamberton*, intending to bring him into disgrace, and to cause him to suffer the punishment which the law inflicts upon the heinous crime of adultery, did falsely maliciously and wickedly utter and publish the fol-

lowing false scandalous and opprobrious *English* words, in the presence and hearing of divers good citizens of this commonwealth, "*William Brown played with Mary Parkinson in the futher room,*" (meaning thereby that the said *William* had committed the heinous crime of adultery in the fodder room with the said *Mary*) "*and that he could prove it by Sally Davidson,*" (meaning thereby that he the said *Simon* could prove by *Sally Davidson* that he the said *William* and *Mary* had committed the heinous crime of adultery) "*and that Robert the second son of Parkinson was belonging to Brown,*" (meaning thereby that the said *William* was the father of and did beget the said *Robert* the son of the said *Mary Parkinson* and *Richard Parkinson* her husband) "*and that one or two of the other children was Brown's,*" (meaning thereby that the said *William* was the father of, and did beget one or two of the other children of the said *Mary Parkinson* and *Richard Parkinson* her husband.)

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The jury having found a verdict for the plaintiff, the defendant moved in arrest of judgment, 1. Because the defendant was not charged in the declaration-with having spoken the supposed slanderous words in the declaration mentioned, *of and concerning* the said *William Brown* the plaintiff. 2. Because the words in the declaration mentioned were not actionable in themselves, and no special damage was laid; and the court below accordingly arrested the judgment.

of

C. Smith and *Duncan* argued for the plaintiff in error, that if it appeared upon the whole that the words were spoken of the plaintiff, it was sufficient without an express averment of the fact. In this case the declaration avers that the defendant intended to injure the plaintiff, and the plaintiff was actually spoken of by name; "*William Brown played, &c.*" innuendo the said *William Brown*; and the jury have found that the words were spoken of the plaintiff, by finding a verdict for him. *Smith v. Ward* (a), *The King v. Lawley* (b). It is not like the case of *The King v. Alderton* (c), for there no mention was made in the body of the libel of the justices of *Suffolk*, against whom it was said to be directed. Here the words themselves denote the plaintiff, and had their applica-

(a) *Cro. Jac.* 674.

(b) *Str.* 904.

(c) *Say.* 280.

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tion to any other *William Brown* been proved, the defendant would have had a verdict. That the words impute the crime of adultery can hardly be doubted. The plaintiff is charged with playing with a married woman in a fodder room, and having children by her, which must mean adultery. Such words were held to be actionable even when the mildest interpretation prevailed. *Roote v. Mohyn (a)*.

Watts for the defendant in error, contended that the introductory part of the declaration should contain an express averment that the words were spoken of the plaintiff; for otherwise it would not be necessary for the plaintiff to prove it. It was so ruled in *The King v. Alderton*; and the reason of that decision was given by Chief Justice *De Grey* in *The King v. Horne (b)*, that the innuendos could not supply the want of an averment in the introductory part, of the libel's being written of and concerning the justices of *Suffolk*, because if they could, they would be in addition to the former matter, and not merely explanatory of it, as they ought to be. So here the words are not averred in the introductory part to have been spoken of the plaintiff, but the first place in which they are made to bear on him is in the innuendo, which of course is not explanation, but new matter. Now nothing which would otherwise remain uncertain, can be reduced to certainty by an innuendo; 5 *Bac. Abr.* 249.; and it being uncertain without the innuendo what *William Brown* was intended, it remains so in spite of it. That the name accompanied the charge is nothing; for the question still recurs, was the plaintiff intended? And as it is not averred that he was, it does not follow from the verdict that any proof was given to that point. The *said William* in the innuendo at most refers but to that *William* of whom the defendant spoke, without shewing what *William* it was. The words however are not actionable. They merely assert that the plaintiff played with a woman, which is no crime; and the only way in which they can be made to impute a crime, is by means of the innuendo.

TILGHMAN C. J. after stating the points, delivered the judgment of the court as follows.

(a) 1 *Roll. Ab.* 66.

(b) *Comp.* 687.

As to the first point, it is enough if it is substantially alleged that the words were spoken of the plaintiff. In many cases the words are spoken of the plaintiff in the third person; *he* did so and so. There it is necessary to aver that they were spoken *of* the plaintiff. But in the present instance, the plaintiff is named in the body of the words; *William Brown* played &c. It is objected that there might be another *William Brown*; but the declaration states that the defendant intending to injure the plaintiff, spoke those words, and the jury have found so; for if it had been another *William Brown*, the verdict should have been for the defendant.

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As to the second point, the rule of law is that words shall be taken according to their natural import. The word *play* is used in various senses. There are many kinds of play, good and bad. Its meaning will be best known by the other words with which it is connected. Now when it is said of a married man, that he *played* with a married woman in a fodder room, and had several children by her, there can be no doubt of the meaning. The jury have found, and in our opinion with great propriety, that the meaning was that adultery was committed.

The opinion of the Court is that the judgment of the Court of Common Pleas be reversed, and that judgment be entered for the plaintiff in error.

Judgment reversed.

Lessee of BIDDLE against DOUGALL and others.

Sunbury,
Saturday,
July 8.

THIS was an appeal from the decision of his Honour the late Judge Smith, at a Circuit Court for Northumberland in October 1806.

It was an ejectment for a tract of land in the purchase of 1768. The lessor of the plaintiff claimed under a lottery application of the 3d April 1769, in the name of Philip Harding, on which a survey was made 15th of May 1772, and before a survey has been returned, it is competent to the deputy surveyor to extend the lines so as to cover any land not appropriated, to the amount of the quantity in the application. But if after the survey has been executed, and before the extension of the lines, a survey has been made upon a younger, or even a *shifted* application, and returned into office or made known to the owner of the first survey, it is not in the power of the latter five years after his survey to extend his lines so as to include land within the last survey.

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returned into office the 3d of *July* 1772; and on the 28th *February* 1800, a patent was granted to Mr. *Biddle*, to whom the title was regularly deduced from *Harding*.

The defendants claimed under a lottery application for 300 acres in the name of *John Blair*, of the same date as the plaintiff's, but superior in number. On this application, a survey of 168 acres was made the 11th *October* 1769, by one of the assistants of *William Scull* the deputy surveyor, excluding the land in question. *Blair* was present when this survey was made, but it did not appear that he was informed by the surveyor at that time, what quantity of land it contained, or that the surveyor himself made any calculation of the contents on the ground. About the time of *Harding's* survey, the agent of *Blair* complained that he had not his proper quantity in the survey which had been made; there was no evidence however that *James Biddle*, the father of the lessor of the plaintiff, who then owned *Harding's* application, was informed of any interference of his survey with the claim of *Blair*.

In the year 1774, two years after *Biddle's* survey was returned, the lines of the survey made for *Blair* in 1769 were extended by *Charles Lukens*, deputy surveyor, so as to include in the whole 236 acres; and the present controversy was in relation to the 68 acres thus added to the original survey of *Blair*, and taken from that of *Harding*.

The questions for the jury were, whether the survey in 1769 was not made fraudulently to the prejudice of *Blair*, so as to entitle him to the full benefit of the survey in 1774; whether the plaintiff's application was not too loose to cover the land on which a survey was made in 1772; and whether it was marked on the ground, when *Blair* extended his lines; upon these points there was a variety of evidence which need not be detailed.

Upon the question of law which arose if the survey of 1769 was not fraudulent, Judge *Smith* charged the jury, that as *Blair's* survey had not been returned, he had a right to extend his lines, so as to cover any land not appropriated to another person; but if in the mean time a survey had been made for another, even on a shifted application, which had been returned into office, or made known to *Blair*, he had

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no right five years after his own survey, and two years after the return of the other, to extend his lines so as to do that other an injury. His honour at the same time expressed an opinion, that *Harding's* survey was marked on the ground at the time *Blair* extended his lines, and was therefore known to him.

The jury found a verdict for the defendants, which the judge refused to set aside, and the plaintiff appealed.

The question of a new trial was now argued by *Hall* and *Duncan* for the plaintiff, principally upon the ground that the verdict was against the weight of evidence.

D. Smith and *Evans* for the defendants.

TILGHMAN C. J. after stating the facts, delivered the opinion of the court.

The plaintiff's location does not apply closely to the spot surveyed, but may be termed a loose application; such a one as according to the practice of the day, might be reasonably applied to the land in dispute. As *Blair's* survey had not been returned, he had a right to extend his lines so as to cover any land not appropriated to another person; but if there had been a survey for another person even on a shifted application which had been returned, or *Blair* was informed of it, he had no right after so long an interval to extend his lines to the prejudice of that person, even although he might have been ill used by the surveyor in making the original survey.

Thus was the law very properly laid down by the late Judge *Smith*, before whom this cause was tried, and he intimated a pretty strong opinion that *Blair* or his agents must have had notice of *Biddle's* survey, because there was evidence of its being made and marked on the ground, and it had been regularly returned into the office of the surveyor general. It is not our custom, when we think the verdict has been against a strong weight of evidence, to enter into a minute discussion of the testimony. We are of opinion on the whole of this case, that it will be conducive to justice to submit the matter to the consideration of another jury. We therefore order that a new trial be had.

New trial awarded.

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 Saturday, 144 321
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 157 311

Lessee of HEISTER against FORTNER.

The registry of a deed defectively proved or acknowledged, is not constructive notice to a subsequent purchaser, although the registry be made in the proper county.

On the 28th April 1788, A assigned to trustees for the benefit of creditors all his lands in the county of N &c. and the same day acknowledged the deed before a judge of the Common Pleas of the county of M, who at that time had no authority to receive an acknowledgment of deeds for lands out of his proper county. On the 26th February 1790, the assignment was recorded in the county of N.

On the 25th March 1789, B obtained judgment against A in the county of M. On the 15th March 1792, he executed an instrument recognizing the assignment of A, and agreeing to be bound by its terms. To February term 1796, B's executors issued a *scire facias* on the judgment, and upon return of one "nihil" signed judgment. To August 1797 they issued a *test. fi. fa.* to the county of N, and a *test. vend. ex. to November 1797*, upon which certain of the lands assigned by A were sold to C the lessor of the plaintiff.

Held, that although the judgment upon one "nihil" was erroneous, and actual notice of the assignment was brought home to B, which made the subsequent proceedings upon his judgment a fraud upon the creditors, yet as the assignment was defectively acknowledged, the record in N was no notice to C, who being a *bona fide* purchaser at sheriff's sale without notice, was therefore entitled to recover.

A judgment creditor is not a purchaser or mortgagee within the meaning of the act of 18th March 1775; but a purchaser at sheriff's sale under that judgment is.

A judgment after one "nihil" upon a *scire facias post annum & diem*, may either be set aside for irregularity, or reversed on error; but the irregularity cannot be noticed collaterally in another suit; and even if the judgment be reversed or set aside, a purchaser at sheriff's sale, to whom a deed has been made, will hold the land.

IN this action of ejectment, a verdict was entered by consent for the plaintiff in the Circuit Court of *Northumberland* county, subject to the opinion of this Court upon a case which stated in substance as follows:

The title in fee of the lands for which the ejectment was brought, was in *Thomas Rees* on the 28th April 1788. On that day, *Thomas Rees* of *Montgomery* county, and *Hannah* his wife, in consideration that *Rees* was indebted to *Charles Massey*, *Christopher Marshall*, and others, in several sums of money which he was unable to pay, and also in consideration of five shillings, conveyed to *Charles Massey*, *Christopher Marshall*, *Israel Jacobs*, and others, their heirs &c. all and singular his lands &c.; upon trust to sell the same in such convenient time as should seem meet to them, and to apply the money arising therefrom to the payment of all the just debts payable by *Rees*, to such creditors as should sign and agree to certain conditions in a certain instrument contained; the surplus money to be for the grantor after paying all debts.

This indenture contained a reservation to *Rees* of full power and perfect liberty to enter upon, occupy, and enjoy all or any part of the said lots, lands &c. situate in the county of *Northumberland*, and to take and receive the yearly rents issues and profits thereof, for and during the term of four

2b 40
 e 36 SC 1532

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years from the 1st of *April* 1788; and also in his own name, or in the name or names of his said trustees, or the survivor or survivors of them, at his own cost, to prosecute suits for the recovery of all or any of the said lands &c. within the said four years, as fully and absolutely as if the assignment had never existed. The grantees, at the same time, were at liberty to sell all or any of the lands in *Northumberland* county within the four years, notwithstanding the above reservation.

On the same day the deed was acknowledged before *Frederick A. Muhlenberg*, a justice of the Court of Common Pleas for *Montgomery* county; and on the 26th *February* 1790. it was recorded in *Northumberland* county.

On the 29th *April* 1788, *Israel Jacobs* and others, twenty in number, creditors of *Thomas Rees*, recognizing the above stated indenture, in consideration thereof did agree to suspend all demands against *Thomas Rees* for four years from the 1st of *April* 1788, yet not so as to debar them from demanding a dividend of such money as should come to the hands of the trustees within that period; they also released to *Rees* his household furniture, and ratified and confirmed the agreements made by the trustees with *Rees*.

On the 25th *March* 1789, *Abraham Weitner* obtained a judgment in *Montgomery* county against *Thomas Rees* and another, in an action of debt instituted to *December* term 1787.

On the 15th *March* 1792, *Weitner*, by an instrument of that date, recognized the deed of *Thomas Rees* of 28th *April* 1788, and also the deed of the 29th *April* 1788, and bound himself, his heirs &c. to abide by the conditions of the last mentioned deed, in consideration of the former, as fully as if he had executed the same.

A *scire facias* upon the judgment obtained by *Weitner* in *March* 1789, was issued by his executors, returnable to *February* term 1796, in *Montgomery* county, to which the sheriff returned "*nihil*." On the 9th *February* 1796, a judgment *nisi* was entered for the plaintiffs. A *testatum fi. fa.* issued to *Northumberland* county, returnable to *August* 1797, upon which there was no return of a levy and condemnation although both were made. A *testatum venditioni exponas* then issued to *November* 1797, and upon this writ the land in question was sold by the sheriff to *Gabriel Heister*, the lessor of the plaintiff, and a deed made accordingly.

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If this court should be of opinion in favour of the plaintiff, judgment to be entered for him in the Circuit Court *nunc pro tunc*; but if in favour of the defendant, then in the same manner a nonsuit to be entered.

The case was argued at *July* term 1808, by *Duncan* on the part of the plaintiffs, and by *D. Smith* and *Watts* for the defendant; and was held under advisement until this day, when the judges delivered their opinions.

The Chief Justice did not sit upon the argument, having been of counsel with the defendant.

YEATES J. The first question which presents itself for consideration in this case, is, whether the deed of assignment from *Thomas Rees* and wife to *Charles Massey* and others, dated 28th *April* 1789, not being recorded in *Northumberland* county within six months from its date, is not merely void to all intents and purposes, except as between him and his trustees?

This depends upon the words of the 8th section of the act, "for acknowledging and recording of deeds," passed in 1715, (1 *St. Laws* 112) which are as follow: "*no deed or mortgage, or defeasible deed, in the nature of mortgages, hereafter to be made, shall be good or sufficient to convey or pass any freehold or inheritance, or to grant any estate therein for life or years, unless such deed be acknowledged, proved, and recorded, within six months after the date thereof, where such lands lie, as herein before directed for other deeds.*" It has been contended that this is a *defeasible deed*; because, if *Rees*, or any one in his behalf, had paid the debts intended to be secured thereby, or if part of the lands conveyed had been found sufficient for those purposes, equity would have decreed a reconveyance to *Rees*, and of course in our state the uses would have enured to his benefit. It is said, that the section under consideration is similar to *sec. 1.* of the statute 27 *Hen. 8. c. 16*, the words of which are, "that no manors, lands &c. shall pass, alter, or change from one to another, whereby any estate of inheritance or freehold shall be made or take effect &c. except the same bargain and sale be made by writing indented, sealed, and enrolled &c. within six months next after the date of the same writings indented &c." Under this statute it has been resolved, (a) that no estate passes until the deed

(a) 2 *Inst.* 671. *Cro. Jac.* 408. *Cro. Car.* 110. 216. 569.

be enrolled; but when enrolled, it relates to the time of its execution, if no act has been done to prevent it. But it has never been considered under the recording act of 1715, that *all deeds were to be recorded within six months, the words in the nature of mortgages, in the plural number, being construed to relate to all the preceding words in the sentence; and the point has been so adjudged in this court upon argument. Assuming this then as the true construction of the law, the only question is, whether this be a mortgage for securing the payment of money, within the intention of the act, or an absolute conveyance. It is certain that the debts due to the creditors formed the consideration of the deed, and with the nominal sum of five shillings, is so expressed therein; but it is also clear, that the trustees were vested with the complete legal estate, and were empowered to sell all or any of the lands in Northumberland county, in such convenient time as to them should seem meet, either by public or private sale, without the control or interference of the grantor.*

I fully admit the maxim, once a mortgage always a mortgage, (a) and that every mortgage is a conditional sale. (b) But mortgages are distinguished from defeasible purchases subject to a repurchase. (c) In this government, where a mortgagee would recover the money due to him, after default made by the mortgagor, the old act of 1705, "for taking lands in execution for payment of debts," prescribes the mode of recovery by suing out a *scire facias*, "after the expiration of twelve months next ensuing the last day whereon the mortgage money ought to be paid, or other conditions performed," and then proceeding upon the judgment by *levari facias*. It will not be pretended, that proceedings of this kind could regularly be had upon the deed under consideration, or that the trustees could not proceed to a sale of the premises conveyed, without the instrumentality of a court of record: and thinking as I do, that mortgages recoverable under the provisions of the former act of 1705, are alone comprehended by the 8th section of the recording

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(a) 1 Vern. 8. 33. 190. 488. 1 Wms. 268.

(b) 3 Wms. 9. 1 East, 295. 1 H. Bl. 119.

(c) Pow. on Mort. 34. 50. 156. 301. 302.

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act of 1715. I am of opinion, that the not recording of this deed in the proper county within *six months* from its date, does not affect its binding force.

The second question is, whether the recording of this deed upon the 26th *February* 1790, operates as constructive notice of its contents, to the lessor of the plaintiff in the present ejectment.

The deed was acknowledged on the 29th *April* 1788, by *Rees* and his wife, before *Frederick Augustus Muhlenberg*, esquire, one of the justices of the Court of Common Pleas of *Montgomery* county, at which time no law of the state authorized such acknowledgment where the lands lie in a different county, nor was the recorder of *Northumberland* county authorized to place the same on record in *February* 1790. It is in vain to say that the law will presume the judicial officer to have competent authority, when it clearly appears to us by his style of office, that he had no such legal power. I by no means think that the doctrine of constructive notice should be extended beyond its settled limits. Lord Chancellor *Redsdale* in *Lord Dunsany v. Latouche*, 1 *Scho. & Lef.* 157, has said that if a deed in *Ireland* be *unduly* registered, it gains no preference thereby; and though his doctrine in that case has been affected by a subsequent decision in the Court of Exchequer, (a) I do not find that his observation in this particular has been questioned. The same thing is asserted by Mr. *Sugden*. He observes, it would seem that the courts might hold, without any violation of principle, that a purchaser should not be deemed to have notice of an equitable incumbrance, by the mere registry of it, unless it was duly registered (b). But the very point has been determined in the Supreme Court of the *United States* in 1805, in *Hodgson v. Butts*, (c) on error to the Circuit Court for the district of *Columbia*, that a mortgage of chattels in *Virginia*, not acknowledged or proved by the oaths of three witnesses, according to the laws of that state, though recorded, was void as against creditors and subsequent purchasers. A case, similar in principle, came before Judge *Brackenridge* and myself at a Circuit Court in *Lewis Town* in *May* 1801, between the *Lessee of Joseph Simon* and *William Brown*. There the plaintiff claimed the lands in controversy under an application in

(a) 1 *Scho. & Lef.* 468.

(c) 3 *Cranch* 155.

(b) *Sugden* 470.

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the name of *Robert Semple*, assigned to *Jos. Simon* on the 18th *January* 1769. The defendant claimed under the same application which was assigned to *William Plunket* on the 3d *May* 1782. To shew a constructive notice to the defendant of this previous assignment to *Simon*, the certificate of its being recorded in *Cumberland* county, on the 26th *March* 1789, was offered in evidence. This defendant held under *Henry Drinker*, who had purchased from *John Thornbrugh*, on the 28th *April* 1795. The assignment to *Simon* was recorded on the oath of *Solomon Etting*, before *Robert Maxwell*, esq. then president of the Court of Common Pleas of *Franklin* county, that *Semple* had acknowledged the assignment to be his act and deed, and that certain persons were the subscribing witnesses thereto. The court held that the affidavit was informal and illegal, and did not authorize the recording of the assignment; it was no evidence whatever of notice to the defendant, and could not be received as such.

Upon these authorities, I hold that the lessor of the plaintiff cannot legally be said to have had constructive notice of the deed to the trustees, though placed on record by them, without having taken the necessary preliminary steps for that purpose.

The remaining question is, whether a court of equity, under all the circumstances of this case, would afford relief to the trustees.

It has been strongly urged on the part of the defendant, that a judgment creditor is not within the meaning of the supplement to the act for acknowledging and proving of deeds, passed on the 18th *March* 1775, 1 *St. Laws*, 703: that the original judgment of *Weitner* in *Montgomery* county was no incumbrance on the lands which lie in *Northumberland* county, and that the judgment on the *scire facias* was a mere nullity, being founded on one *nihil* returned, nor could it have been served either on *Rees* or the terretenants, who lived out of the bailiwick of the sheriff, and consequently the judgment entered thereon was radically defective, being without notice: that this procedure of *Weitner* was in direct violation of his plighted faith, and fraudulent as to the other creditors of *Rees*, and therefore could confer no right: that if the trustees had known of the levy or sale of the lands, they could readily have obtained the sale of the lands to be

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set aside, as well on the ground of irregularity in not serving the *scire facias*, as of *Weitner's* written engagement; and that this being the first opportunity afforded them of contesting the matter, it should be taken *nunc pro tunc*: that this is substantially the same case as if the sheriff had levied on the lands of a stranger, whose deed had not been regularly recorded, because, as to *Weitner*, the lands were no longer subject to his execution, nor could he levy on them against his own stipulation: and that under the 4th section of the aforesaid act of 1705, the sheriff's vendee is to hold the land for such estate, as the debtor himself might could or ought to do, at or before the taking the same in execution.

These arguments have some forcé, but more plausibility. They are, however, entitled to distinct answers, if such can be given. Unquestionably it is a case of hardship on either side; and where the loss shall be thrown, on solid legal principles, conducive of permanence to land titles and to the public security, is the great object of inquiry.

I freely concede that a judgment creditor is not to be considered as a purchaser or mortgagee, within the words or spirit of the supplement to the recording act, passed on the 18th March 1775. Neither the preamble, enacting clause, nor exception, embraces the case of a judgment creditor; and if the legislature had meant to include such creditors, they would have so declared themselves in clear and unequivocal terms. This point was determined by Judge *Smith* and myself, at a Circuit Court held in *Fayette* county in October 1804, between the *Lessee of James Rogers and John Gibson* and others. Money, which is advanced on a mortgage, is parted with on the security of the lands; but a man is as often trusted on the security of his person and effects, as of his lands. But a purchaser under a judgment stands on a very different footing from the plaintiff in that action.

I likewise agree, that the judgment on the *scire facias* in *Montgomery* county, was wholly irregular; and that the court from which the process issued, would without hesitation have set aside the sale, on both of the grounds alleged, if application had been made to them previous to the acknowledgment of the sheriff's deed. The judgment also would have been reversed on error. Nevertheless, under the last section of the aforementioned act of 1705, "if the judg-

"ment had been reversed for error, the lands could not be returned, nor the sheriff's sale thereof be avoided, but restitution only should in such case be made of the money or price for which the lands were sold." This is strictly agreeable to the principles of the common law, in case of the sale of a term for years in *England*, in order that sales by sheriffs may not be defeated, (a) provided the sale has been to a stranger. (b) The justice and regularity of the proceedings of one tribunal, can only be reexamined in a superior court, and cannot be reviewed or corrected by another tribunal *collaterally* in another suit. But if *Weitner* or his executors had become the purchasers at the sheriff's sale, the trustees might have taken advantage of the illegality of their proceedings, and of the fraud practised by him or them on the other creditors. Express notice also of the deed made to the trustees would be brought home to him by his written recognition thereof. It is the great prominent feature of this case, that neither direct nor implied notice of the assignment can be imputed to the lessor of the plaintiff. He was therefore a *bona fide* purchaser, and paid his money, confiding in the judgment of a court of competent jurisdiction, under a fair sale, and is entitled to protection under the words and spirit of the act of 18th March 1775. Having the legal estate in him, a court of chancery, between two equities, would not interpose to his disadvantage, but where the loss has happened, there would it be permitted to continue. It falls within the common rule, that where, of two persons equally innocent or equally blameable, one must suffer, the loss shall be left with him on whom it has fallen. Where there is equal equity, it is fully settled, the law must prevail. It has been decreed, that the registering of an equitable mortgage in *Middlesex*, is not presumptive notice of itself to a subsequent legal mortgagee, so as to take from him his legal advantage. (c) And I may be permitted to repeat what sir *Joseph Jekyll* said upon another occasion, (d) that under the special circumstances of this case, though Mr. *Heister* might have searched the records of *Northumberland* county, yet he

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(a) 8 Co. 96 b. 143 a. 1 Vaz. 195, 196.

(b) Dy. 363 a. Yelv. 180. 2 Leon. 92. 5 Co. 90. Jenk. 264. Cro. El. 278.

(c) Ambler 678.

(d) 2 Eq. Cas. Abr. 609. pl. 7.

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was not bound to do it, when the insertion of the deed on the record was wholly unauthorized.

When it is objected here, that the plaintiff can only succeed to the rights of *Weitner*, and can take no larger estate than *Rees* held at the time of the lands being levied, it must be remembered, that the judgment on the *scire facias* and the executions issued thereon, were not merely void but voidable; and that *Heister* remains uninfected with the slightest species of fraud, and an entire stranger to all the proceedings between the original parties. It will not be questioned, if *Rees* had sold these lands to an innocent stranger, who had acted with the most perfect good faith throughout the whole transaction, and had obtained the registry of his deed before the assignment had been duly recorded in the only manner known to the law, that such vendee would have been within the plain words and meaning of the supplement to the recording act. Now, to *Weitner* and his executors, the plaintiff is wholly a stranger, and whatever right or interest *Rees* could legally convey, the sheriff might levy on and sell, and his vendee coming in by act of law, would be entitled thereto. He cannot possibly be in a worse situation than if *Rees* had sold and conveyed; on the contrary, he might justly claim every preference which the policy of the law confers on purchasers at sales made by the officers of justice. Lord *Hardwicke* has said (a) that the rule is right, that whoever takes the assignment of a bond, being a chose in action, takes it subject to all the equity in the hands of the original obligee; but length of time and circumstances may vary that, and make the case of the assignee stronger.

For these reasons, I am of opinion, that however unworthy the conduct of *Weitner's* executors may have been, (and it surely merits great reprehension, and will be viewed by every honest man with much indignation, if they really knew the facts) however irregular their proceedings, and however hard the case may bear on the creditors in general, the trustees can impute their loss solely to their own mistakes and negligence, and that their only remedy is either by writ of error on the judgment in *Montgomery* county, or by suit against the legal representatives of *Weitner* for their gross

(a) 1 *Vez.* 123.

misconduct. On the whole, I am abundantly satisfied that judgment should be entered for the plaintiff.

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BRACKENRIDGE J. In this case the title is admitted to have been in *Thomas Rees*, on the 28th April 1788. This title is alleged to be derived to the lessor of the plaintiff, through a judgment in favour of *Abraham Weitner* against *Rees*, on the 28th March 1789, in *Montgomery* county, upon which the executors of *Weitner* obtained judgment on *scire facias* the 9th February 1796; a *testatum fi. fa.* to *Northumberland*, issued upon this judgment, returnable to August 1797, and a *testatum vend. exp.* to November 1797, upon which the lands in question were sold to *Heister* by the sheriff, who made this return to the *venditioni*, and executed a deed accordingly.

The alleged defect in this derivation, as vesting the interest of the debtor in the purchaser, is an alleged irregularity in the proceedings under which the sale was made. No returns appear on the record of the *testatum*, of a levy on the property sold, so as to ground a *venditioni exponas* on which the sale was made. But the proper time for the debtor, or those who have an interest in him, to have availed themselves of this defect, was before the deed was made by the sheriff, or acknowledged in court. This and the like objections come forward properly at that stage. But even on a writ of error, supposing this irregularity to be such error as would avoid the sale, a debtor who had not availed himself of it at the proper stage, would not be relieved against the sale, even at common law, where a stranger was the purchaser. *Goodyer v. Junce*, 1 Yelv. 179, no return made to ground a *testatum*, yet execution. It shall be presumed there was such writ, and if sale has been made to a stranger, yet upon the reversal the debtor shall not have his term again; for it is the party's folly he does not pay the judgment, and if such a sale should be avoided no one would buy goods of the sheriff, whereby many executions would fail.

The title of plaintiff is also resisted by what is alleged to be a title derived from the debtor *Rees*, prior to the lien under which the plaintiff derives title, that is, the attaching of the judgment under which the sale was made; in fact be-

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fore even the judgment was entered on which the *testatum* issued, which alone could attach upon the lands in question. This was by a conveyance from the debtor. The first question which arises must respect the nature of this conveyance. If absolute, and for a valuable consideration, and *bona fide*, transferring the property, it takes place of the judgment or *testatum fi. fa.* under it, for it is prior. But the consideration was the discharge of the grantor's debts, except as to the nominal sum of 5s.; and though creditors are the grantees, yet they are in fact but trustees for this purpose, and by the special provision of the conveyance, only for such of the creditors, as should sign and agree to certain conditions in a certain instrument, *the surplus money to be for the grantor after paying all debts.* This must mean the debts of such creditors as should sign and agree as aforesaid; or taking it to mean all debts of all creditors, and the grant to be for this object, yet it is "reserving to the grantor full power and perfect liberty to enter upon occupy and enjoy all or any part of the said lots and lands, situated in the county of *Northumberland*, and to take and receive the yearly rents, issues and profits thereof for and during the term of 4 years, the grantees to be at liberty to sell any of the lands in *Northumberland* county within the 4 years notwithstanding the above reservation." The land in question was in the county of *Northumberland*.

This grant was good against the grantor, and defeasible only by satisfying the object of the grant. But by so doing, it was as much defeasible as a mortgage. A sale made in pursuance of the trust would be good; but the grantor must be considered as having an equitable right, to supersede all execution of the trust by satisfying the object of it. Where an estate is conveyed to trustees, upon trust to sell and pay debts, &c. and to pay the surplus of the moneys to arise by sale to the grantor, the debt of the judgment creditor can only, it should seem, affect the surplus moneys in the hands of the trustees, and is not a *lien on the estate itself*. *Sugden's Law of Vendors*, 305. But no sale here had taken place prior to the levy or sale under the judgment; so that the case of a *purchaser under the trustee does not intervene*. But this grant though good against the grantor, or judgment creditor to this extent, cannot farther affect creditors who do not choose to accede to the instrument. As to them it is void; for in the

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words of the statute 13 Eliz. c. 5. it may be *to the let or hinderance of the due course and execution of law and justice*, “and as against such persons whose actions, suits, debts, accounts, &c. might be in anywise *disturbed, hindered or delayed*, it is void, frustrate, and of no effect.” Even with personal notice of this deed therefore, I take it the debt before due and owing, and contracted on the credit of this fund, as must be presumed, could not be affected by this grant, in proceeding to recovery.

In this view of the case, it might not be necessary for me to consider the effect of the registry of this conveyance as giving notice of it, the duly registering being questioned on the ground that it had not been proved according to the requisites of the registering act. Nevertheless having an opinion, I may express it, which is, that it would not seem to have been so proved as to warrant the registering in the county of *Northumberland*; and taking that to be so, I have no hesitation in saying that it could not be notice. This if notice, is constructively so; and the law cannot construe that as having an effect, which is not brought within its requisites. It is on this ground that it cannot give priority; and how then shall it operate as notice, which is the principle on which priority is given. This was my way of thinking at the argument; since which I find in the books a confirmation of my opinion. For though it is thrown out by the chancellor *Reidesdale*, that *if registry be notice, it must be notice whether duly registered or not*; *Shoales and Lefroy* 157; yet we have this *dictum* adverted to in *Sugden's Law of Vendors* 470, with the author's comment, “that this is assuming what has never been decided; and it should seem that the courts might hold without any violation of principle, that a purchaser should not be deemed to have notice of an equitable incumbrance, by the mere registry of it, *unless it was duly registered*. Why should equity interfere in favour of an incumbrancer, when he has not complied with the salutary requisitions of that very act, upon which he lays his foundation for relief.” To apply this to the deed in question, it is taking it to be but an equitable conveyance; but the reasoning is the same where the contest, as it is alleged in this case to be, is between a prior and subsequent absolute conveyance. Why should the law interfere in favour

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of a purchaser, to *construe notice* by a registry which has not been made according to the requisites of the registering act?

But we come now to the main strength of the case on behalf of the defendant. The judgment creditor under whom the plaintiff claims, *Abraham Weitner*, did by his deed recognize the deed of *Rees*, and also another deed of other creditors recognizing the deed of *Rees*; and therefore it cannot be in his mouth to say that he is *letten, hindered, or delayed* in his execution; and the conveyance in question bars any right derived to him under his judgment, thus proceeded upon contrary to his agreement. But who is it that shall set up this bar against him? *Thomas Rees* the debtor, or those who come in under him by virtue of these trust deeds, so given or acceded to? Shall they be permitted to set this up against a purchaser under *Thomas Rees* the debtor? Will it not be an answer from a purchaser to say, you suffered this judgment to stand on the record without an entry of satisfaction or stay, and what is more, this deed of *Weitner* is not recorded duly or unduly. I have had no notice of it, actual or constructive. I have been led to lay out my money by this appearance of an existing judgment, and proceeding under it; and whether by the fraud of the judgment creditor, or the want of information on the part of his executors, the negligence of the debtor or his grantees, it ought not to work me an injury. It is contrary to the policy of the law in supporting sheriffs' sales, which might have been set aside on motion, or reversed by writ of error. In this view of the case, a purchaser is in a better situation than a judgment creditor himself. For the want of notice will protect him, while the privity of the judgment creditor to the transaction, takes that away.

As to a judgment creditor not being a purchaser, strictly speaking, he is not so. His lien approaches him to the character of a mortgagee. One cannot call a judgment creditor a purchaser; all that he has by the judgment is a lien upon the land. 2 *Peere Wms.* 491. But "the statute of *Elizabeth*, "expressly extends to charges upon the land; for the words "are 'shall or do bargain, &c. or charge the same lands,' and "charges upon, as well as charges out of the land, seem "within their natural import. It is true the conusee of a "statute or recognisance, has, in strict legal language, no

" charge upon the land; he has neither a right in, nor
 " a right to the land; and if he release his right in or to the
 " land, he may nevertheless extend it if he choose. But yet
 " in common intendment, statutes and recognizances are
 " charges upon the land, and they have been so called in
 " courts of law; and it would have been too much to circum-
 " scribe the operation of a law for the prevention of frauds,
 " by insisting on such technical formalities. In *Garth v.*
 " *Estfield*, it was said, that though the statute did not ex-
 " pressly speak of conusees, it should be expounded to
 " extend to them, for the statute had always received an
 " equitable construction to relieve purchasers." *Roberts on*
Fraudulent Convey. 392. The purchaser at sheriff's sale, is a
 purchaser, and protected under want of notice like every
 other. The consequences would be monstrous, if the law
 would suffer him to be disturbed by the collusion and secret
 trust, or to be affected even by the culpable negligence, of
 those who were under a moral and legal obligation to do
 something, which would save others from laying out their
 money without consideration. The policy of the law to
 obviate fraud, is against it. I concur in the argument of
 counsel on one side in this case, that even had the debt been
 paid by *Rees* or by his trustees to the judgment creditor,
 or had an agreement in writing been made but not filed, or
 a release not put upon record, this would not affect an in-
 nocent purchaser under the outstanding judgment. There
 will be a loss in this case, provided the estate of *Rees* should
 prove insolvent; and it comes to this, whether it shall fall
 upon creditors who have gone out of the ordinary course,
 by an arrangement with the debtor, however founded in
 humanity to him and a spirit of equal justice to other credi-
 tors, yet who have not conducted the arrangement in such a
 manner, as to save purchasers from laying out their money
 on the property which was the subject of the arrangement.
 This I admit is taking it as established, that the conveyance
 to the trustees in the first instance, did not absolutely divest
 the property out of the debtor; or, that the not duly record-
 ing it as against other creditors, avoided it. For otherwise
 whatever might become of the judgment of *Weitner*, the land
 conveyed would be out of the reach of the lien of it. And I
 am aware that the considering these conveyances in this
 point of view, is in the way of almost any arrangement that a

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debtor possibly can make for a *pro rata* payment of his debts where he is indebted to several, short of a consent of the whole of his creditors, and contrary to the policy of the statutes of bankruptcy in this particular, and of insolvent acts; but I think it better that the arrangement should be left to the positive regulations of statute, or to the ordinary course of law, than that an opening should be given by an arrangement of the debtor's own, to collusion and fraud. If a debtor wishes to give property in discharge of what he owes, let him transfer it absolutely, individually according to their debts, or to one for the use of the whole, as the law does in the cases of bankruptcy or insolvency; and not as here for the use of such as shall sign and agree to certain conditions, or to cut and carve for himself as to use and occupation and perception of profits, and bringing suits in his own name or in that of his trustees. This is inconsistent with a fair and *bona fide* parting with the property, and in the nature of the disposition, and most generally in the intention of it, is but a cover for fraud, and a reservation of interest for the debtor himself. From all the experience I have had, it takes place in the case of shuffling debtors, who have contracted debts without an honest intention of discharging them, and have put off the payment, with a view to save something in the confusion of appropriation. If a man must fail, let him call his creditors, and leave the disposition to their consent, or where they cannot agree, to the ordinary disposition of the law; it is in vain for him to attempt to continue a sort of ownership; and it is unreasonable, where his situation raises a presumption that his conduct has not been at least prudent, in the management he has already had of his affairs. I have a strong leaning against every thing of this kind, and think it best that it be left to the law to settle a man's affairs, when they have become so embarrassed that it must be evident he has not been provident himself, than that we should hear of his taking care of his creditors by deeds of trust, not having the fair open and general consent of the whole of the creditors. It is better that he should be suffered to prefer individual creditors, than that the least countenance should be given to ways and means of defrauding all.

On these grounds, I am of opinion for the plaintiff.

Judgment for plaintiff.

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Sunbury,
Tuesday,
July 11.

Lessee of EVANS against NARGONG.

THIS was an appeal from the decision of BRACKEN-
RIDGE J. at a Circuit Court for *Northumberland*, in
May 1807.

It was an ejectment for a tract of land in *Northumberland* county, which the plaintiff claimed under the following title:
On the 5th April 1774, a warrant issued in the name of
"Ernest Burk, for 300 acres "joining Dietrick Reese;
"Jacob Reese, Jonathan Pingley and William Armstrong,
"in *Buffaloe* township *Northumberland* county," which was a
very accurate description of the premises in the ejectment;
and on the 20th April 1774 the purchase money was paid to
the proprietaries.

On the 11th and 13th March 1776, *Hawkins Boon* procured a survey to be made under this warrant, upon the land described, by *Henderson* the deputy surveyor, who upon a draught of the survey wrote the following memorandum, "draught of a tract as situate in *Whitedeer* township, formerly *Buffaloe*, *Northumberland* county, surveyed, "in dispute between *William Armstrong* and *Hawkins Boon*."

Hawkins Boon was killed by the *Indians*, and his house and papers burned, at the taking of *Freeling's* fort on the *Warrior's* run in the year 1778.

In November 1785, an action was instituted against the administrators of *Boon*, in which judgment was obtained for 178*l.* 4*s.* 10*d.*; a *fi. fa.* upon this judgment was levied upon the land in question, and under a *venditioni exponas* it was sold and conveyed by the sheriff on the 27th June 1797, to *Evans* the lessor of the plaintiff.

The defendant's title commenced with an application of the 3d April 1769, No. 711, in the name of *William Armstrong*, for 300 acres on the south side of the west branch of the *Susquehannah*, above and adjoining land applied for by

very returned, without an order from the land office; and no private intention or action of his, can hinder the proprietaries from selling the adjoining land to any person who may apply for it.

A warrant issued from the land office on the 5th April 1774, for 300 acres in the name of A., upon which the purchase money was paid. It was surveyed in 1776 under the direction of B., and the deputy surveyor marked upon the survey, that it was in dispute between B. and C. In 1778 B. was killed by the *Indians*, and his house and papers burned. The land was afterwards sold under execution as the property of B., and up to the trial of the ejectment by the purchaser in 1807, no person had ever claimed A.'s warrant in opposition to B. Held that these circumstances are sufficient evidence, that B. was the owner of A.'s warrant. Where a survey made and returned into office for D., is claimed by C. under his own application, C. has no right to make any addition to the survey.

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William Gift, including the mouth of a small run about six miles above the mouth of *Buffaloe* creek.

In the year 1769, both before and after his application, *Armstrong* was making an improvement on the land, when a certain *James Parr* commenced an improvement upon the same tract, under an application of the 3d *April* 1769 in the name of *Jonathan Pingley* for 300 acres, which were surveyed in *October* 1769. A dispute took place between *Parr* and *Armstrong*, and on the 4th *April* 1770, the latter entered a caveat in the land office against the acceptance of a survey for, or the grant of a patent to, *Parr* or any other person in right of *Pingley*, alleging that *Pingley's* application was executed elsewhere, and that the land last surveyed upon that application belonged to him by virtue of his application No. 711. On the 29th *October* 1770 the hearing on the caveat was postponed, and in 1771 *Parr* and *Armstrong* agreed to divide the land in front on the river, so that the former should include his improvement, and *Armstrong* was to fill up his application by taking in land in the rear. This back land included the premises in controversy. Accordingly, when in the year 1773, one *Henty* settled down upon the land in question, *Armstrong* drove him off, and in *March* 1776, he caused a survey to be made upon his application by the deputy surveyor, and took in part of the land in dispute.

On the 25th *April* 1794, *Armstrong* conveyed to *Dale*, under whom the defendant held, his application No. 711, and on the 4th *May* 1794, a survey was made for *Dale*, which extended the lines so as to include 320 acres, comprehending more of *Boon's* survey. *Dale* also became the proprietor of *Pingley's* application.

The questions were two. 1. Whether *Boon* was the owner of *Burk's* warrant. 2. Whether the title to the land in dispute had not vested in *Armstrong*, and by him been transmitted to the defendant.

For the plaintiff it was said on the first point, that *Boon's* ownership of the warrant to *Burk* was a matter of necessary inference. *Boon* directed and probably paid for the survey. It was *Boon* who disputed with *Armstrong*, and from that time to the trial no one had ever claimed the war-

rant in opposition to *Boon*. His death in 1778, and the destruction of his papers by fire, sufficiently accounted for the want of a written document; but his acts, and the silence of others, shewed that he either was the owner of the warrant when it issued, having used *Burk's* name, or he became the owner by purchase immediately after.

On the *second* point, it was remarked that in the year 1770 *Armstrong* claimed the survey made under *Pingley's* application, and nothing more or less. According to his assertion, it was the land covered by his own application, and he therefore caveated the acceptance of the survey for *Pingley*. This was conclusive evidence to shew what was *Armstrong's* claim, and what his improvement in 1769 extended to. His agreement with *Parr* was a private matter between the two, and could affect no one else. Before *Armstrong* extended his lines so as to take in the back land, *Burk's* warrant of 5th April 1774 called expressly for it, and therefore bound it from its date; and the proprietaries, knowing officially that *Armstrong* claimed other land, had a perfect right to grant the warrant. *Boon* having followed up the warrant by a survey in 1776, did not lose his priority, and therefore the plaintiff was entitled to recover.

On behalf of the defendant it was contended, that no right to *Burk's* warrant being established in *Boon*, was of itself fatal to the plaintiff's claim. This being a warrant upon which the purchase money was paid, stronger proof should be required of a conveyance, than in the case of a location; and there was no proof of any kind. The fire might afford presumption of the loss of a deed, if its former existence had been shewn; but to take it as evidence of loss in this case, was to argue both the destruction and existence of the deed from the same accident. *Boon's* superintendence of the survey was as much the act of an agent, as of a principal.

The answer to the plaintiff's *second* ground, was that *Armstrong* had an improvement on the land in 1769, that in 1770 he claimed the premises under his improvement, and that in 1773 he turned-off a man who had settled upon the land in dispute, because it was within his claim of 300 acres. *Burk's* warrant adjoined lands of *Pingley* and *Armstrong*; therefore the only question was, what did *Pingley* and *Arm-*

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strong claim on the 5th April 1774, the date of that warrant? Now, it was most evident, that one of them claimed the land in dispute, and had exercised an act of ownership, by turning off a settler. If the plaintiff succeeded, neither *Armstrong's* nor *Pingley's* survey would include the 300 acres, to which they were respectively entitled.

His Honour charged the jury, that in his opinion, there was sufficient in the fact of *Bagn's* directing the survey, in his disputing the right with *Armstrong*, in the destruction of his house and papers, and in the non-claim of any person under *Burk* except *Boon*, to justify a presumption that *Burk* had conveyed to *Boon*, or that the warrant was taken out by *Boon* in the name of *Burk*. He therefore thought the plaintiff ought to recover; for if *Armstrong* by his earlier application and residence had a priority, still if by determining his claim, on any side, he led another to take an office right for, or even to settle on that side, that other ought not to be disturbed.

The jury found for the defendant. A motion was made for a new trial, which was overruled with a view to take the opinion of this court; and accordingly the case was now argued upon appeal, by *Huston* and *Watts* for the plaintiff, and by *Hall* and *Duncan* for the defendant, upon the points made below.

TILGHMAN C. J. after stating the facts, delivered the opinion of the Court. Upon the trial of this cause, two questions arose. 1. Whether *Boon* was the owner of *Burk's* warrant. 2. Supposing he was, whether he was entitled to the land in dispute. As to the *first*, without discussing the testimony, we think it sufficient to express our opinion that under all the circumstances of this case, there was satisfactory evidence of *Boon's* being the owner of *Burk's* warrant. On the *second* point, it appears to us that the plaintiff made a very strong case. It was to be seen on the records of the land office that *Armstrong* claimed a survey made and returned for *Pingley*, and that he claimed nothing else. In this situation, *Armstrong* had no right to make any addition to the survey returned into the land office, without an order from the land office; and no private intention or action of his, could hinder the proprietaries from selling the adjoining land to any person who might apply for it. We consider the

law on this point to be settled; and if it were otherwise, it would be productive of great confusion, and great injustice. On what ground the jury formed their verdict, does not appear. But the judge before whom the cause was tried was not satisfied with the verdict, although in order to take the opinion of this court on a point of law which he thought of importance, he overruled the motion for a new trial. Our opinion is, that a new trial should be granted.

New trial granted.

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Lessee of MURRAY and Wife against GALBRAITH.

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THE estate of the defendant in the premises in question was taken in execution, and sold by the plaintiff to one *George Lang*, who, pending this ejectment, obtained possession under the act of 6th April 1802, 5 St. Laws 266.

Upon an affidavit by *Lang* of the truth of these facts, and that he was substantially interested in the matter in controversy, *Watts* moved to add the name of *Lang* as co-defendant in the suit.

Duncan and *Evans* contra, suggested that other persons were interested in *Lang's* purchase, and objected to the motion unless all their names were disclosed, and placed upon the record.

But the Court thought there was nothing in the objection, and granted the motion.

A person, who has purchased the defendant's interest in the premises at sheriff's sale, and after ejectment brought has obtained possession under the act of 6th April 1802, may be made a co-defendant, notwithstanding there may be persons interested in the purchase, whose names are not disclosed.

1809.

Sunbury,
Wednesday,
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PACKER against SPANGLER and Wife.

IN ERROR.

"She swore a
"false oath, and
"I can prove it,"
not actionable;
nor are the
words helped
by an innuendo of
perjury.

ERROR to the Common Pleas of Centre county.

Spangler and Wife declared against *Packer* in the court below for slander of the wife. The declaration contained four counts, the last of which charged that the defendant in a certain discourse concerning the wife, "published and "proclaimed the false feigned malicious and opprobrious "English words following, of and concerning the said *Barbara*, in the presence and hearing of &c.; that is to say, *she* " (meaning the said *Barbara*, wife of the said *Peter Spangler*) "swore a false oath, (meaning that the said *Barbara* had "been guilty of the crime of wilful and corrupt perjury) and "I can prove it." The defendant pleaded not guilty, with leave to justify. Upon the trial, evidence was given upon all the counts, and the jury found a general verdict for the plaintiff, five hundred dollars damages, which were levied by execution.

S. Riddle for the plaintiff in error referred to the case of *Holt v. Scholefield*, (a) and that of *Ward v. Clark* (b) as decisive of the question; the words themselves not imputing the crime of perjury, and there being nothing in the colloquium which did, nor any thing in the innuendo which could, extend their signification.

Huston for the defendants in error; relied upon the case of *Rue v. Mitchell* (c) as having extended the effect of an innuendo so far, as to communicate to the words used by the defendant below, such a meaning as would support the count. But

PER CURIAM. The precise point has already been determined by this Court, in the case of *Schaffer v. Kintzer*. (d)

(a) 6 D. & E. 691.

(b) 2 Johnson 10.

(c) 2 Dall. 58.

(d) 1 Binney 537.

The words are not actionable, nor can the *innuendo* help them; and therefore the judgment must be reversed. At the same time the Court award restitution of the money levied by execution in the common Pleas, and a *venire facias de novo*.

Judgment reversed
and *venire de novo*.

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PACKER
v.
SPANGLER
and Wife.

Lessee of M'KNIGHT and another, Executors of
M'Knight, against YINGLAND and others.

Sunbury,
Thursday,
July 13.

THIS was an appeal from the decision of the late Mr. Justice SMITH, at a Circuit Court for *Huntingdon* in April 1807.

It was an ejectment for a tract of land in the county of *Huntingdon*, to which the plaintiff's title was as follows:

On the 28th July 1766, a warrant issued to *Baynton* and *Wharton*, calling for "the Saplin land, and the Indian path leading to the great island." Upon this warrant, 540 acres, the land in question, were surveyed and returned into office the 4th December 1766.

On the 30th April 1767, *Baynton* and *Wharton* conveyed to *Richard Neave* and *Richard Neave junr.* of London merchants, in fee simple as tenants in common.

On the 7th March 1776, *Richard Neave junr.*, who was then in *Philadelphia*, and who had carried on with *George Woods*, the agent for this land, all the correspondence relating to it, his father *Richard Neave* residing in *England*, signed the following indorsement upon the survey in the surveyor general's office: "This survey not having been made on the land located by the warrant on which it is returned, I do hereby relinquish the right to the above to *George Woods Esquire. Richard Neave junr.*;" and the fact, as it appears

from the relinquishment, for 18 years, when he and *A.* conveyed the tract to a purchaser for a valuable consideration.

Held that the indorsement upon the survey by *A.* was an abandonment of the survey by both partners, and that their vendee could not recover any part of it.

A. and *B.* purchase a warrant and survey as tenants in common. *B.* resides in *England*, and *A.* is the acting partner in *Pennsylvania*, who carries on all the correspondence with an agent in relation to the land surveyed. *A.* ten years after the return of survey into office, by indorsement thereon in the surveyor general's office declares "that the survey not having been made on the land called for by the warrant on which it is returned, (which was the fact) he thereby relinquishes the right to the same to *C.*" *B.* did not dissent.

1809. ed in evidence, was, that the warrant was not laid upon the land for which it called.

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of
M^r. KNIGHT
v.
YINGLAND.

On the 1st *March* 1794, the *Neaves* conveyed all their lands in *Huntingdon*, describing this tract and others, to *Robert M^r. Knight*, under whom the lessors of the plaintiff claimed.

The title of the defendants was as follows:

On the 1st *May* 1767, a warrant for 250 acres was granted to *John Cochran*, on which 323 acres were surveyed the 27th *October* 1767, being part of the land included in *Baynton* and *Wharton's* survey.

On the 10th *October* 1767, *Cochran* conveyed to *George Woods*. On the 8th *March* 1776, the day after *Neave's* indorsement, *Cochran's* survey was returned into office, and a warrant of acceptance issued to *George Woods*, in consequence of *Cochran's* conveyance and of *Neave's* indorsement. In this return of survey, the residue of the land in *Baynton* and *Wharton's* survey not covered by *Cochran's* warrant, was marked *vacant*.

On the 9th *March* 1776, the tract of 323 acres was patented to *Woods*, who on the same day conveyed to *Harry Gordon*, under whom one of the defendants claimed.

The other defendants claimed under a settlement and improvement in the year 1784, on that part of the survey relinquished by *Neave*, which was not included in *Cochran's* survey, but was marked in the return of that survey as *vacant* ground.

By a letter from *George Woods* to *Richard Neave junr.*, produced in evidence by the plaintiff, it appeared that after *Neave* made his relinquishment, his warrant was put into the surveyor's hands to be laid on other lands, and was actually laid by mistake on land which belonged to him and his father, and returned into the surveyor general's office.

Upon these facts it was conceded at the trial by the plaintiff's counsel, that as to one half of *Cochran's* survey claimed under *Harry Gordon*, the plaintiff could not recover; because *Richard Neave junr.* had a right to relinquish a moiety, and had relinquished it to *George Woods*; but as to the moiety of that survey belonging to *Richard Neave the elder*, and as to the whole of the 217 acres covered by improvement, it was contended that the plaintiff ought to recover,

because the son had no authority to relinquish his father's interest, and in fact had only relinquished to *George Woods*, whose claim went no further than *Cochran's* survey.

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ofMcKean
v.
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By the defendants' counsel it was argued, that *Richard Neave* junr., who was the acting partner, and exclusively managed the partnership interest in this land, had a right under the circumstances to relinquish the whole, and had relinquished the whole. That until a patent was obtained, the title was not complete as between the purchaser and the proprietaries, and that before that event it was competent to one of two holders of a warrant, certainly to the acting partner in the concern, to reject a survey improperly made. That *Neave* the son had relinquished the whole, not only in terms but in effect; because *George Woods*, the agent of the *Neaves*, had returned the 217 acres as vacant ground, which was a declaration by the *Neaves*, that the old survey was completely rescinded, and that the defendants who claim by settlement, might enter and improve the land. That the proprietaries had accepted the relinquishment by accepting *Woods'* survey under *Cochran's* warrant; and that *Neave* the father, had never dissented from the act of the son. That the plaintiff could therefore recover no part of the claim.

His Honour charged the jury, that if the writing executed by *Richard Neave* junr. was to be considered as a conveyance of the land, it could pass no more than his moiety; but that the real question was as to the power which one tenant in common has over a partnership warrant under the practice in this state; and as to this, the inclination of his mind was, that under the circumstances of this case, *Richard Neave* the son had sufficient power to relinquish the whole survey, and had actually relinquished the whole. The land called for by the warrant had not been surveyed; the indorsement was a public recognition of the fact, and the evidence given upon the trial confirmed it. In *Pennsylvania* one partner generally superintended the survey of a company warrant; and it had been the universal practice, if he acted without fraud upon his partners, to consider his act as the act of all. He might order the survey in such shape or figure as pleased him; and if he should find that it had not been made upon the ground called for by the warrant, it appeared to his Honour that he might refuse to accept the survey, that he might

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demand the land called for, and of course might relinquish the survey which gave him other land. It was a matter of fact, his Honour said, for the jury to determine, whether *Richard Neave junr.* had not been the acting partner, and whether the father had not acquiesced in the son's act. The whole turned upon the difference between conveying lands, and making a disposition of a survey in *Pennsylvania*. If the jury were of opinion that *Neave* the son was the acting partner, that he had been guilty of no fraud, and that his co-tenant had acquiesced in his act, his Honour was then of opinion that the indorsement was a refusal to accept any part of the survey, or a relinquishment of the whole, that the survey thereupon became a nullity, that other land might have been surveyed upon the warrant, and that even if the defendants had no title, the plaintiff could not recover: certainly he could not recover more than a moiety of the tract of 540 acres, as at all events there was a relinquishment of the son's right in the whole.

The jury found for the defendants. A motion for a new trial was then made and overruled, and the plaintiff appealed to this court.

It was argued at the present term by *Watts* and *Riddle* for the plaintiff, and by *S. Riddle* and *Duncan* for the defendants; and the Chief Justice, after stating the titles and facts, now delivered judgment.

TILGHMAN C. J. It will not admit of a moment's doubt, that the plaintiff who claims under a deed from the two *Neaves* to *Robert M'Knight*, now deceased, must be barred as to one half of his claim; because when *Richard Neave junr.* relinquished the survey returned on the shifted warrant of *Baynton* and *Wharton*, he was tenant in common with his father of an undivided moiety. But it is contended that he could not affect the title of his father, who was entitled to the other moiety. This in truth is the only point worthy of consideration, and it appears to us that there is very little difficulty in it.

The title of a person who takes up land, is not complete before he obtains a patent, although he may maintain an ejectment upon a warrant and survey. It is not uncommon to make alterations by permission of the land office, after return of the survey; and in no case can it be more proper than

in the present, where the survey has been executed on land not called for by the warrant. Under such circumstances, where one of the owners of the survey was residing in *England*, and the other in *Pennsylvania*, where all the correspondence with *George Woods* the agent, touching this land, was carried on by the partner residing in *Pennsylvania*, and where the other partner never by word or deed expressed any dissent from the relinquishment of the original survey, before the year 1794, it is not unreasonable to presume that such relinquishment was approved of by the partner residing in *England*. The officers of the proprietaries' land office consented that the survey first returned should be given up, and the very next day granted part of the land so given up, to another person. They consented also that Messrs. *Neave* should lay their warrant on other land; it was so understood by *Neave junr.*, who accordingly took measures for procuring another survey.

Upon all the evidence given in this case, Judge *Smith* declared his opinion to the jury that the first survey was to be considered as abandoned by Messrs. *Neave*, and consequently the plaintiff was not entitled to recover any part of it. We fully concur in this opinion. The judgment of the Circuit Court must therefore be affirmed.

Judgment affirmed.

Lessee of MILES against POTTER and another.

Sunbury,
Thursday,
July 13.

THIS was an appeal from the decision of SMITH J. at a Circuit Court for *Centre* county in *May* 1807.

On the 28th *July* 1773, *A.* took a warrant from the land office descriptive of certain land, which was surveyed on other land the 15th *June* 1774. The survey was returned into office before the 26th *August* 1783; for on that day an indorsement was made upon the return by a clerk in the land office, that "*A.* believed the survey wrong laid, and requested the surveyor to adjust it, which he had agreed to." On the 17th *September* 1787, *A.* applied to the board of property for an order to survey his warrant upon the land it called for, which was granted; and the survey was accordingly made on the 26th *November* 1787, and returned the 27th *February* 1788.

On the 26th *October* 1772, *B.* took a warrant descriptive of certain land, and on the 19th *June* 1785, surveyed it upon land it did not call for, namely, the land called for in *A.*'s warrant of 1773, the premises in the ejectment. The survey was returned into office probably in 1785 or 1786, but at the latest on the 9th *June* 1787, and was patented the 14th *January* 1788.

Held, that *A.* by his neglect to follow up his objection to the survey made in 1774, had lost his claim to the land described in his warrant of 1773, and that *B.* was entitled to recover.

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of
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v.
POTTER.

It was an ejectment for a tract of land, which the plaintiff claimed under the following title:

On the 26th *October* 1772, a warrant issued to *Samuel Miles* for 300 acres "on the sinking branch of *Penn's* creek "adjoining *Nesbit*, and near lands surveyed for *Reuben Haines, &c.*"

On the 19th *June* 1785, a survey was made under this warrant for 308 acres, 16 perches, (the premises in the ejectment) but it was not the land called for by the warrant.

This survey was marked on the books of the surveyor general as having been returned the 9th *June* 1785, which was a mistake, being ten days before the survey; but it was patented to *Miles* on the 14th *January* 1788.

The defendants claimed under the following title:

On the 28th *July* 1773, a warrant issued to *James Potter* (under whom the defendants claimed) for 200 acres "in the "great plains, to include the forks of the road in *Bald Eagle* "top;" which was said to be the land in dispute.

On the 15th *June* 1774, 215 acres $\frac{3}{10}$ ths were surveyed upon this warrant by *William Maclay*, deputy surveyor, adjoining *John Cline* and others, which was not the land called for by the warrant.

When this survey was returned was also doubtful; but on the 26th *August* 1783, the following indorsement was made upon the return by *Edward Lynch*, then chief clerk in the surveyor general's office: "General *Potter* believes this survey was wrong laid, and requests *W. Maclay* to adjust it, "which he, said *Maclay*, has agreed to." 26th *August* '83. *E. Lynch*. There was also an indorsement on the return by the same person in the following terms: "General *Potter* "has taken out a warrant of the 1st *July* 1784, for this tract, "as he says himself." *E. L.*

On the 1st *July* 1784, *Potter* took another warrant for 150 acres "joining *George Woods* and the other part of the "tract said *Woods* lives on in the great plains, *Potter's* "top." This was not the tract surveyed under the warrant of 1773, but adjoined the land called for by that warrant; and on the 27th *November* 1787, a survey of 154 $\frac{1}{2}$ acres was made, including part of the land in controversy.

On the 17th *September* 1787, general *Potter* represented to the board of property that his survey in 1774 was exc-

cated upon land not called for by the warrant; and prayed an order for a survey on the land it described, which was granted, and a survey accordingly made on the 26th *November* 1787, and returned the 27th *February* 1788. This survey took in about one half of the plaintiff's survey in 1785.

It appeared in evidence that about the year 1775, general *Potter* sold a part of the tract said to be described in his first warrant, to one *George Woods*; who improved it, and except a short interval, had resided on it ever since. It also appeared that both colonel *Miles* and general *Potter* were actively engaged in the war of the revolution, which terminated in 1783.

The principal points in controversy at the trial were these: 1, Whether *Potter's* warrant of 28th *July* 1773, described the land in question: if it did not, the defendants had no title, as the survey for *Miles* was executed and returned before that of *Potter*. 2. If it did, then whether *Potter*, by his delay, was not to be postponed to *Miles*. 3. Whether the improvement of *Woods* did not at all events preclude the plaintiff's recovery.

The *first* was altogether a question of fact. The *third* was answered on the part of the plaintiff, by saying that the improvement of *Woods* was not claimed by the plaintiff, that *Woods* was not a party to the suit, and that general *Potter* never claimed the land under an improvement, but under his warrant and survey. The *second* was the material question; and upon this point,

It was contended by the plaintiff's counsel, that even granting his warrant to have been shifted, yet if it was surveyed and returned into office before another person acquired title to the land, it was as valid as if it called for the land surveyed. The sole question then was, whether *Potter* had acquired such a title, or whether from his laches, he was not to be postponed. The plaintiff's warrant was surveyed on the 19th *June* 1785, and returned into office. In the date of this return there was an obvious mistake either in the month, the day of the month, or the year; but to allow the objection the utmost latitude against the plaintiff, the survey was returned on the 9th *June*, in 1786 or 1787, either of which points of time was prior to *Potter's* application to the board of property; and in addition to this, when the plaintiff made

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his survey, he knew by the official return that *Potter's* warrant had been laid upon other land. On the other hand the defendants' warrant was surveyed on land not in question, in the year 1774. When it was returned into office is a matter of doubt, but it was before the 26th *August* 1783. On that day *Potter* certainly knew that his warrant was shifted. He probably knew of it at the time of the survey, as warrantees usually superintend the survey. He relied upon a correction by the deputy surveyor, which he must or ought to have known was impossible after the survey was returned, without a special order from the board; and he took no step to vacate the first survey, or to obtain other land upon his warrant, until more than four years had elapsed from its return, until two years after the plaintiff's survey, and one or two years after its return. Such neglect as this with a full knowledge of all the circumstances, ought to postpone his title to one consummated by a return into office in the mean time. The war was an excuse for delay only while it lasted; from 1783 to 1787 was a period of continued laches on the part of *Potter*, for which he ought to suffer, and not the plaintiff.

It was answered by the defendants' counsel, that the warrant of the plaintiff being shifted, it vested no title until return into office, or actual notice of survey. Actual notice was not brought home to general *Potter*, and when the survey was returned had not been shewn. The date of the return was impossible; and any other date must be put argumentatively, for there was no reason to take either of the dates conjectured by the plaintiff's counsel. The defendants' title then stood thus: they had a warrant descriptive of the land, and the only question was, whether it had been abandoned. The war was a clear excuse up to 1783. *Potter* then objected to the first survey, and requested a new one. *Woods* was in possession of the land under him; and his objection on the official return, with the possession of *Woods*, were notice to *Miles* two years before his survey, that *Potter* had not relinquished the land. The agreement of *Maclay* to adjust the survey, even if he was not authorized to do it, was at least an excuse to *Potter*; for he relied upon it, and whether correctly or not was the same thing as to the question of laches. In *September* 1787 he obtained the order of the board, the survey was made, and his title was complete. The attempt

to defeat it was defective in two particulars; *first*, by setting up a prior return of survey, when that return was not shewn to have been made before the order of the board of property, and the survey for *Potter*; and *secondly*, by setting up laches, when the plaintiff was himself guilty of it in neglecting a survey for twelve years after his warrant, and general *Potter* was excused by his reliance upon the promise of the deputy surveyor.

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The case was left very much to the jury by his Honour, as the decision principally involved questions of fact, and the jury found for the defendants.

A motion was then made for a new trial, which was overruled; his Honour remarking at the same time that the verdicts did not perfectly satisfy his mind; but he overruled it without prejudice, that the plaintiff might have the full benefit of an appeal.

The cause was now argued by *Huston* and *Duncan* for the plaintiff, and by *S. Riddle* and *D. Smith* for the defendants, upon the same grounds which were taken at the trial; and the opinion of the court was delivered by the Chief Justice, after stating the facts in general, and particularly that the plaintiff's survey, even if there was a mistake in the year, must have been returned at the latest on the 9th *June* 1787, because in *January* 1788, he obtained a patent.

TILGHMAN C. J. The warrant to general *Potter* calls for "200 acres of land in the great plains, to include the forks of the road." It may be applied not improperly to the lands in dispute, though in some respects it is loose; because not only the plains but a considerable quantity of wood land, and also *Penn's* creek are included in the present survey; whereas the "great plains," strictly speaking, take in neither wood-land nor creek. At what time general *Potter* was informed of the survey made by *William Maclay*, does not appear. Perhaps he did not know of it immediately; and considering the circumstances of the country during the revolutionary war, which commenced in 1775, and ended in 1783, and in which the general took an early and active part, it may be thought not extraordinary that we hear of no objection to the survey till *August* 1783. But having made his objection then, he ought to have followed it up. He should have ap-

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plied to the board of property sooner; for it was not in the power of *William MacKay* to make any alteration in a survey returned by him, without a new authority from the land office. It was too long to suffer the matter to rest from *August 1783* to *September 1787*. In the mean time, viz. *19th July 1785*, the plaintiff appropriated the land; and although his warrant was shifted, yet his right attached from the time of the return of his survey, which for the reason before assigned, must in all probability have been prior to general *Potter's* application to the board of property.

Some stress has been laid on the circumstance of general *Potter's* having sold 100 acres of land, part of which at least is included in his survey, to *George Woods* about the year 1776, who made an improvement on it, and still holds it. To this it has been answered that the plaintiff claims no part of *Woods'* improvement; and that *Potter* never claimed under an improvement, but under his warrant and survey. *Woods* is no party to this suit, nor is there evidence sufficient to invalidate the plaintiff's claim against the defendants by reason of any title in *Woods*.

On the whole of this case, we think justice requires that the matter should be submitted to the consideration of another jury; especially as the plaintiff will be barred by the act of limitations, if judgment is entered on the verdict which has been given.

New trial awarded.

Sunbury,
Thursday,
July 13.

RIDGELY and another *against* SPENSER.

IN ERROR.

The verdict of a former jury in the same cause which has been set aside by the court, is not evidence.

WRIT of error to the Common Pleas of *Huntingdon* county.

The plaintiffs in error brought an action on the case against the defendant as a common carrier by water, for not delivering at *Baltimore*, certain forge hammers and castings which he had received at *Hoskel's* landing upon the *Juniata*,

2b 70
 34 SC 502

and undertook to carry for hire. Upon the trial of the cause, the defendant's counsel offered in evidence the record of a verdict which had been given upon a former trial of this cause, and was afterwards set aside. The evidence was objected to; but the court admitted it, and sealed a bill of exceptions.

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There were other points of law and evidence ruled by the court below, upon the trial and in their charge to the jury, which appeared upon the same bill of exceptions; particularly that the opinion of witnesses as to the custom of carriers upon the *Juniata*, and the general understanding and belief of the country as to the liability of carriers by water, might be given in evidence; and that it was a matter for the decision of the jury, whether the facts proved were sufficient to discharge the carrier; but this court gave no opinion upon these points.

S. Riddle for the plaintiffs in error cited the case of *Pitton v. Walters* (a) to shew that a verdict is not evidence until final judgment is entered upon it; the reason of which is that the verdict may have been set aside. *Peake Ev.* 50. Here the verdict had been set aside, and the very fact had taken place, the possibility of which would of itself have overruled the evidence.

Duncan for the defendant answered that it was competent to a party to read the entire record of a suit between himself and the opposite party, and of course to read the *postea*, which formed a part of it; and that if the verdict was not evidence of any fact having been legally decided, it was evidence of itself, namely, that there had been such a verdict, which made it admissible for one purpose, and that was enough. But

PER CURIAM. The former verdict in this cause was not legal evidence. Let the judgment be reversed, and a *venire de novo* be awarded.

Judgment reversed
and *venire de novo*.

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Sunbury,
Thursday,
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BACHMAN'S Case.

A deposition taken *ex parte* under a rule of court, after the hour named in the rule, cannot be read in evidence.

Semble that it may, if the opposite party had notice, and did not attend at the hour named.

ON the hearing of this cause, which was an appeal by *Bachman* from the settlement of his accounts as an executor, in the Orphan's Court of *Dauphin*, *Fisher* offered in evidence the deposition of a witness taken *ex parte* under a rule of court. The rule authorized the taking of the deposition at a certain place on a day named, between the hours of ten and twelve; it was taken on the day and at the place pointed out, but at four o'clock P. M. It was objected to on account of this irregularity; and the court refused to hear it.

YEATES J. mentioned a case of the *Lessee of Davis v. Means*, where the deposition was taken after the appointed time; but it was proved that the opposite party who had notice did not attend at the time, and the deposition was admitted in evidence.

Sunbury,
Friday,
July 14.

DEAN against SWOOP.

IN ERROR.

In an action against a common carrier by water, for the loss of the plaintiff's goods, where the defence is set up that carriers by water are by custom answerable for loss only in case of negligence, it is not competent to the defendant to give in evidence, that in a case where the plaintiff had acted as a common carrier, he had refused to make compensation for a loss.

WRIT of error to the Common Pleas of *Huntingdon* county.

The action below was against *Swoop* as a common carrier, to recover damages for the loss of the plaintiff's goods, which he undertook to carry for hire from a place on the *Juniata* to *Columbia*. The cause was tried under the general issue, and upon the trial, as it appeared by the bill of exceptions, the defendant offered to give in evidence, "the opinion of a certain witness as to the custom of the country, and the carrying trade on the river *Juniata*, and the general under-

Quere, whether carriers by water on the *Juniata* &c., are answerable in the same degree as common carriers by the law of *England*.

"standing and belief of the country, as to the liability of carriers by water." He also offered to prove, "that the plaintiff and a certain *Moses M'Ivaine* as partners, had a boat loaded in part with the property of others, which boat was wrecked, and the property in part lost; and that the firm of *Dean and M'Ivaine* refused to compensate, and did not compensate those whose property was thus injured or lost." In both instances the court admitted the evidence, notwithstanding the objections of the plaintiff, who tendered a bill of exceptions. The jury found for the defendant.

What was the tendency of the evidence first offered, did not appear by the record; but it was understood to be, that carriers by water were answerable for such losses only as were occasioned by their own negligence.

S. Riddle for the plaintiff in error, argued that the evidence first objected to was inadmissible, because its object was to set up the opinions of witnesses against the settled law of the land. The law of *England* in relation to common carriers, he said was the law of *Pennsylvania*; it had been adopted in practice, and it was sanctioned by the soundest policy. The degree of a carrier's liability was of the essence of his office. He might accept specially as to value, or as to the quality of the thing carried; but take from him his liability for every thing but inevitable accident, and the act of a public enemy, and he was no longer a common carrier, but a mere bailee; in which case, the proof of negligence lying exclusively in his own power, all those frauds against which the common law has established so complete a barrier, might be practised beyond the possibility of detection. Hence it was a maxim that every carrier for hire was a common carrier, unless there was a special exception in the contract, *Coggs v. Bernard* (a); and to the contract alone the court should have looked for the extent of the defendant's liability in the present case.

Riddle was here stopped by the court, who desired the defendant's counsel to speak to the second exception.

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(a) 2 *Ld. Ray.* 917.

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Huston and Duncan then argued that the evidence last admitted was proper, because it went to prove the opinion of the plaintiff himself, with regard to the custom for which the defendant contended. The whole case turned upon the existence of a custom in relation to carriers by water, varying from the law of *England*. This custom was to be proved by witnesses intimate with the subject, by their opinions understanding and belief founded upon this intimacy, and by their practice in cases to which the custom applied; the practice of the plaintiff was therefore a recognition of the rule, and corroborated the testimony before given. The material point was then the admission of the testimony first offered; for if it was correct, the acts of the plaintiff in confirmation of it, were evidence. As to the existence of the custom, it might be remarked that the verdict of the jury established it; but where could be the objection to it upon principles. A common carrier might limit his own liability by special provision, and take his case out of the general rule. *Bull. N. P.* 71. *Gibbon v. Paynton* (a). He is liable on account of his reward. It might as well therefore be the object of a particular custom to limit his liability, and by so doing, to diminish his reward, as the object of a special contract. The restriction of the custom to water carriers in a certain part of the state, was no objection to it. A custom might apply only to a certain description of men; as the custom of the way-going crop among farmers, *Wigglesworth v. Dallison* (b); it might apply to a particular county, *Furneaux v. Hutchins* (c); and in these cases the particular custom would control the general rule. *Peak's Ev.* 319. The admission of the evidence was the more proper, because it was not known that there had ever been a decision in *Pennsylvania*, upon the liability of carriers by water. [YEATES J. In *Lea v. Stroud*, before M^r Kean Chief Justice and myself in *Northumberland* county, the plaintiff recovered upon the principles of the common law, on a carrying by water.]

Riddle answered that the plaintiff's act was not evidence, even by the defendant's argument, because the evidence was simply that he had refused to pay a loss. There might

(a) 4 Barr. 2298.

(b) Doug. 207.

(c) Comp. 887.

have been a special contract, and a variety of circumstances to justify the refusal upon the ground of the common law.

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TILGHMAN C. J. after stating the exceptions, and that the court would give no opinion but upon the last, delivered judgment upon that point, as follows.

We are very clear that this exception was well founded. What the plaintiff and another person had done in the transaction alluded to, was totally irrelevant to the issue joined, and the evidence could only tend to draw the attention of the jury from the point before them, and perhaps to influence their minds. It has been contended that the evidence was proper, as it tended to corroborate the testimony given before, touching the custom of the country, by shewing that in the plaintiff's own opinion, a carrier was not liable for losses which happened without his neglect or want of skill. But this is not the case; for it does not appear that the plaintiff and *M^r Irvine* received any compensation for the goods in their vessel, nor whether or not the loss happened by the act of God, nor whether they were carried under a special agreement, as is often the case. In short it does not appear that they were to be considered in any respect in the light of common carriers. This kind of evidence was the more improper, as it was taking the plaintiff by surprise; for he had no reason to suppose that a matter quite foreign from the business in question, would be made the subject of inquiry. On this exception our opinion is that the judgment of the court of Common Pleas be reversed. On the other exceptions we decline giving any opinion.

Judgment reversed.

Venire de novo.

1809.

Sunbury,
Saturday,
July 15.

DOUGLASS and another *against* BEAM and another
executors of BEAM.

The plaintiffs declared upon a bond dated the 20th day of *May* 1799. The defendants craved *oyer*, and then pleaded *payment*, upon which issue was joined. Held that upon this issue after *oyer*, the plaintiff might give in evidence a bond dated the twentieth day of *May* 1799.

A variance between the declaration and the bond of which *oyer* is given, is matter of demurrer, but not of error.

Where the docquet entries set forth that "defendant craves *oyer* of writ and bond, and special imparlance," and then that "defendant pleads payment with leave, &c." the bond is considered by the practice in *Pennsylvania*, as having been placed on the record.

ERROR to the Common Pleas of *Dauphin* county.

The plaintiffs below declared in debt upon a bond dated the *twentieth* day of *May* 1799. By the short entries on the docquet, the defendants craved "oyer of the writ and bond, and a special imparlance," and afterwards pleaded "payment, with leave to give special matter in evidence," upon which plea issue was taken.

Upon the trial the plaintiffs produced a bond dated the *twentieth* day of *May* 1799, to the reading of which in evidence the defendants objected upon the ground of the variance; but the Court, thinking the word *eight* insensible, admitted the evidence, and, at the request of the defendant's counsel, reduced their opinion and the reasons for it to writing, agreeably to the act of 24th *February* 1806, and they accompanied the record. After the removal of the cause by writ of error, the counsel of the plaintiffs in error gave notice to the opposite party, to produce at the argument the bond upon which the suit was brought; and accordingly the bond given in evidence below was produced, and verified by the oath of the attorney who brought the suit, and in whose possession it had remained ever since.

Elder and Hopkins for the plaintiffs in error; argued that the plea of payment admitted only a bond of the 20th *May* 1799, which they accordingly came prepared to meet; but the bond produced bearing a different date, the plea did not relate to it, and of course no issue was taken as to the payment of it. Had oyer of the bond been placed upon the record, it would have been competent to them to demur for the variance; but that not being done, no course was open but to object to the evidence upon the ground that it was impertinent to the issue. The only material question then was, whether a variance existed. The declaration, the proffer, the plea and replication, were all founded on a bond of the 20th *May*, and the bond offered in evidence was of the

twentieth~~eight~~, that is the twenty-eighth of *May*. The day was certainly material, as it is always matter of substance in written contracts. It identified the bond. A bond of a different date was a different bond, to be encountered perhaps by a different plea, and was wholly irrelevant to the issue. Variances alighter than this had been fatal, as *nor* for *not* in *Dr. Drake's* case (a) and in *Bristow v. Wright* (b). The true rule was given by *Buller* in *King v. Pippett* (c), that in cases upon contracts it is necessary to set out the contract in the declaration, and if it is different in any part, the whole foundation of the action fails, because the contract is entire. It was true the defendants might have demurred, had oyer been given, but they might also upon the trial object to the evidence. *Steele v. Lock Navigation Company* (d).

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Fisher and *Duncan* for the defendants in error argued, that by the entry on the docket according to the practice in this state, the bond must be considered as spread upon the record before plea, and therefore if a variance existed, it was the duty of the defendants to plead it in abatement, as in *Roberts v. Harnage* (e) and *Coan v. Bowles* (f), or to demur; it was not a matter to be assigned for error. *Gravear v. Stephens* (g). But in truth there was no variance. The word *eight* was rejected as nonsense, for which the case of *King v. Pippett* was a clear authority; for it was a settled rule that nothing should be deemed a variance which could be helped by any construction the case could admit of. *Cook v. Duchess of Hamilton* (h). The date moreover was immaterial; there was no occasion to lay it. *Woodcock v. Morgan* (i). Even upon *non est factum* the substantial part of the issue would be the delivery. *Lane v. Pledall* (k). Such a variance would not support a demurrer; *Lane v. Green* (l); *a fortiori* it was of no importance upon the issue of payment, where the only use of producing the bond was to shew whether payments were indorsed. Whatever in pleading was alleged by one party, and not denied by the other, was admitted. The plaintiffs alleged a bond, and set it out upon

(a) 2 *Salk.* 660.(e) 2 *Salk.* 659.(i) 6 *Mod.* 306.(b) *Doug.* 668.(f) 1 *Show.* 171.(k) *Gro. Jac.* 136.(c) 1 *D. & E.* 240.(g) 10 *Mod.* 166.(l) 12 *Mod.* 651.(d) 2 *Johns.* 286.(h) 10 *Mod.* 368.

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oyer; the defendants confessed, and tried to avoid it. If this variance could be set up, then the plea of payment was equivalent to *non est factum*, that is, the admission of the bond was the same thing as the denial of it; and by whatever means the variance was brought to the notice of the court, whether by an objection to evidence or otherwise, the same result would follow. In fact the variance was waived by the plea; and of course the bond offered in evidence, was pertinent to the issue, because by the pleading it was agreed to be the bond declared upon.

TILGEMAN C. J. after stating the case, delivered his opinion as follows:

When the defendants had oyer of the bond, they might have taken advantage by demurrer, of any material variance between the declaration and the bond; but they cannot take such advantage on a writ of error. The point however is, whether the bond ought to have been read in evidence. The Court of Common Pleas were of opinion, that there was no variance, because the word *eight* was insensible, and should be rejected. If the case rested solely on that, I will not give a positive opinion how the law would be. Courts have gone a great way in support of an action. Strictly speaking the word *eight* is insensible. I confess however the inclination of my mind to be, that the date is to be considered as the *twenty-eighth* of *May*; but I speak this with deference to others who hold a contrary opinion. I have no doubt however that upon the issue of *payment*, after oyer, the bond was properly received in evidence; the variance was altogether foreign from the issue, and was waived by the plea of payment. The only difficulty which has occurred to my mind is, that although oyer was prayed, the bond was not placed on the record. But upon reflection and consultation with my brethren, who have had very long experience in the practice of the courts, I am satisfied that the bond is to be considered as having been placed upon the record. It is our practice to make short entries, without making up the full record. This custom, which was adopted to save time and expense, is often attended with the inconvenience which results from want of certainty. A very great inconvenience it is, but it must be submitted to; for it would produce incalculable mis-

chief, if this court should all at once proceed to reverse the judgments of inferior courts, because the papers referred to in short minutes were not inserted on the record. It is evident that the counsel for the plaintiffs in error considered the bond as part of the record, because they gave notice to the adverse counsel to produce it on the argument in this court, which would have been altogether improper if it was not part of the record. In consequence of this notice it has been produced, and verified by the oath of the counsel who brought the action, and in whose possession it has always been.

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I am of opinion on the whole of this case, that there is no error in the proceedings in the Common Pleas, and that the judgment of that court be affirmed.

YEATES J. of the same opinion.

BRACKENRIDGE J. of the same opinion.

Judgment affirmed.

JACKSON *against* The Commonwealth.

IN ERROR.

Sunbury,
Saturday,
July 15.

THE plaintiff in error was convicted of adultery in the Quarter Sessions of *Luzerne*, and sentenced to pay a fine of fifty dollars, be imprisoned at *hard labour* three months, and pay the costs. Judgment in a criminal case not reversed in part.

Evans for the plaintiff in error said the judgment was manifestly erroneous, because the punishment by law for adultery was a fine, and simple imprisonment. 3 *St. Laws* 115, sec. 7.

Hall for the Commonwealth answered that a judgment might be affirmed in part, and reversed in part. 2 *Bac. Abr.* 501. *Error M.* The sentence was good as to the fine.

PER CURIAM. Let the whole judgment be reversed.

Judgment reversed.

END OF JULY TERM, 1809.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

Western District, September Term, 1809.

JOHN BURD *against* The Lessee of DANDALE.

IN ERROR.

Pittsburgh,
Wednesday,
*September 14.**

UPON a writ of error to the Common Pleas of *Bedford* county, the case was thus:

Dansdale, the plaintiff below, brought an ejectment to *April* term 1805, for 150 acres of land in the township of *Dublin*, to which he proved the following title.

John Burd the elder was in his life time entitled to the premises in question, by virtue of an improvement. He died in the year 1792, having by his will devised the same to *Elizabeth Walker* his grand daughter in fee. *Elizabeth Walker*, in the year 1797, intermarried with *Charles Sipes* who had issue by her; and in *August* 1797, *Dansdale* obtained a judgment, and to file them of record, makes no alteration as to those matters which are the object of revision upon a writ of error; and therefore the reasons of a judge for not granting a new trial, though filed of record, are not, however erroneous, subject to review upon a writ of error.

An inquisition is not necessary to the sale of an estate for life, or of any other estate of uncertain duration.

A sale of lands after the return day of the *venditioni exponas*, is not void, if the lands were advertised for sale on a day before, and the sale was continued by adjournment.

Where a levy is set aside, and a *vend. exp.* is issued without a fresh levy, a sale under it is void, and the purchaser derives no title. The 9th sec. of the act of 1705, protects a purchaser in the event of a reversal of the judgment under which the sale was made, but not where the sale was made under void process.

* This cause was decided at *September* term 1808; but the reporter did not obtain the opinion of the court, until it was too late to insert it in the series of that term.

ment against *Sipes*, issued a *fi. fa.* to November 1797, and levied upon the property. No inquisition was held to condemn the land, but it was sold to *Dansdale* under a *venditioni exponas*, and a deed acknowledged by the sheriff the 25th February 1800. *Sipes* and his wife were alive at the time of the trial.

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The defendant set up, 1, A title in *Samuel Riddle*. 2, In *George Burd*.

Riddle's title. In October term 1784, *M. Sanderson* obtained a judgment against *John Burd* the elder. A *scire facias* to revive the judgment issued against *Benjamin Burd* and *William Elliot*, executors of *John Burd*, returnable to November 1797, when the judgment was revived. A *fi. fa.* issued to January 1798, and a levy made on the premises; a *venditioni exponas* to April 1798, and an *alias* to August 1798, under which the land was sold to *Riddle*, and a deed acknowledged by the sheriff the 31st January 1799.

Burd's title. On the 18th January 1793, *Benjamin Burd*, the executor of *John*, took out a warrant for 50 acres in the name of *Elizabeth Walker* and his son *John Burd*, calling for old *John Burd's* improvement, and on this warrant a survey was made the 23d May 1793 of 52 acres 129 perches. On the 18th February 1793 he took out another warrant for 100 acres adjoining the above in the name of his son *George Burd*, on which a survey was made the 23d May 1793 of 97 acres 27 perches. These two surveys comprehended the land in dispute. On the 23d February 1794, a patent was granted to *George Burd* for both surveys, reciting a conveyance from *Elizabeth Walker* and *John Burd*.

The defendant also took four exceptions to the plaintiff's title. 1, That the ejectment, being founded upon a title by improvement alone, was barred by the 5th sec. of the act of 26th March 1785, 2 *St. Laws* 281, there not having been peaceable possession under it, within seven years next before the action. 2, That *Sipes* had no estate which could be taken in execution. 3, That no inquest had been held under the *fi. fa.* 4, That the sale was after the return day of the *venditioni exponas*.

The plaintiff, in order to defeat *S. Riddle's* title, relied not only upon the staleness of the judgment on which it was founded, but upon the following entry on the execution doc-

1809. *John Burd v. The Lessee of Dandale.* quet, in the handwriting of the prothonotary's clerk. "*M. Sanderson v. Burd's Executors*. No. 33. *Vend. Exp.* to April term 1798. Land not condemned at inquest. Levy set aside at April 1798, to levy anew. Inquisition held, and condemned. *Vend. Exp.* to August 1798. No. 26. returned, lands sold to *S. Riddle* for 50*l.*" By which it appeared that the original levy was set aside, and the lands sold without a new levy.

The benefit of *George Burd's* patent, the plaintiff derived to himself by the following evidence. In the year 1786, the elder *Burd* leased the premises to one *William Gray* for ten years upon an improving lease. *Gray* deposed that in the summer of 1794, *Benjamin Burd*, who was executor of *John*, and guardian of *Elizabeth Walker*, came to him on the land with one *Stephen Keepers*, and told him that *Keepers*, who had bought the land, would take it for the unexpired time of the lease, and discharge him from his covenants to improve; and that accordingly he left the land in the autumn. The patent was granted to *George Burd* about six months before. *Elizabeth Walker* was a minor when the warrants were taken out. *John Burd* the younger and *George Burd* were also both minors, and sons of *Benjamin Burd*. If *Benjamin Burd's* design was to appropriate to himself or his family the property of his ward, it was a fraud, and by operation of law, the possession of *Keepers* and of any one under him was her possession, and the patent enured to her use; if his design was honest, then it was his intention that his son *George* should be her trustee, and of course he was a trustee for the plaintiff. And in order to prove that *Benjamin* had not advanced money in discharge of old *John Burd's* debts, so as to entitle himself to appropriate the 150 acres to his own use, the plaintiff offered in evidence the administration account of *Benjamin*, to which the defendant objected; but the court admitted it and the defendant took an exception.

The defendant then called the sheriff who executed the process in *Sanderson's* suit, to prove that the entry on the execution docquet was made by mistake, and that it was not the levy but the inquisition that was set aside, and a new one ordered, which took place. The sheriff said that he did not recollect whether another inquisition was held, but from the marks of old wafers to the *fi. fa.*, and from the return to the

vend. exp. he was inclined to think it was; but this was mere belief, his memory did not serve him, and he should have made the same return if another had not been held.

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The evidence being closed, the defendant's counsel prayed the court to instruct the jury that the matters given in evidence by the plaintiff were not sufficient to entitle him to recover. But the court delivered in substance the following charge.

Walker President. The plaintiff in this cause claims 10 acres of arable, and 140 acres of woodland, to prove his title to which, he has given in evidence a judgment rendered by this court at *August* term 1797, at the suit of *G. Dansdale* against *C. Sipes*, a *fi. fa.* to *November* term 1797, with the levy thereon indorsed, a *vend. exp.* an *alias* and *pluries*, upon the latter of which the sheriff returned land sold to *G. Dansdale* for eight dollars on the 31st *January* 1799. He has also produced to you a sheriff's deed for the premises dated the 25th *February* 1800. These proceedings vest in the lessor of the plaintiff all the title of *C. Sipes*. To shew you that *C. Sipes* had title to the premises, the plaintiff has produced the will of *John Burd* deceased, by which the land in question is devised to *E. Walker*. He has also produced to you *W. Gray*, who says that *E. Walker* intermarried with *Sipes* previous to *August* 1797, that he, *Gray*, took a lease of *John Burd* in the year 1786 for 10 years, built a cabin, cleared land, and resided on the premises about 8 years, and was in possession at the death of *John Burd* the elder. This witness also says that after the death of *John Burd*, *B. Burd*, who had sold the premises to *Keepers*, induced the witness to give the possession to *Keepers* in consideration of being released from such covenants as to improvements as remained to be performed by the witness. The land in question was at the death of *John Burd* held by improvements. *Gray* having taken a lease and made a *bona fide* improvement under *J. Burd*, such a title accrued to *J. Burd* as could be devised, and by law *Gray* became the tenant of the devisee. *Benjamin Burd* was testamentary guardian of *E. Walker*, and *Gray* was tenant to him as such. *Gray*, by direction of *B. Burd*, gave up the possession to *Keepers*. The person who came into possession under *Gray* at the instance of *B. Burd*,

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the guardian of *E. Walker*, must be considered as her tenant. *J. Burd* died in 1792. *Gray's* lease did not expire until 1796. The two warrants which have been given in evidence were taken out in 1793, and a patent issued to *George Burd*, in which is recited a deed from *E. Walker* and *J. Burd*. It has been contended that this ejectment not having been brought within seven years from the desertion of the improvement by *Gray*, is barred. But does the law cited by the defendant apply? It does not. 1st, Because the possession was obtained by *B. Burd*, the guardian of *E. Walker*. This possession and the taking out of the warrants must be considered either as fair or fraudulent. If fair, then these warrants were taken for her use. 2d, If the possession and warrants were not taken for her use, then there was a fraud practised by the guardian, and the warrants would enure to the use of his ward; for if it was permitted to a guardian to take out a warrant to cover for his own use the property belonging to his ward, the court would be called on to sanction a fraud.

But it has been contended that *C. Sipes*, by his marriage with *E. Walker*, did not acquire such estate in the premises as could be sold and transferred by the sheriff pursuant to the act of assembly authorizing the sale of lands, &c. This act authorizes the sale of lands; and it would be absurd if the greatest estate could be sold, and a less estate could not.

It has been objected that no inquisition was held. The holding of an inquisition is necessary, only where the plaintiff could hold the land for seven years. In this case no inquisition was necessary, as an estate only for the life of *E. Walker* could be sold, which might terminate in less than one year.

It was also objected that the *vend. exp.* of the plaintiff was returned before the sale. But a *venditioni exponas* is not necessary, to the validity of the sale of such an estate as is now in question. It might have been sold on the *fi. fa.* as a chattel. We are therefore of opinion that the sale was legal, whether the return day of the *venditioni* was past or not. The two warrants have something extraordinary in their appearance. The reason of taking two warrants is uncertain; whether to avoid interest, or to limit the claim of *E. Walker*, is uncertain; but in either case the warrants must be presumed to be taken for her use.

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The next question is on the title of the defendant. It is founded on a judgment entered against *John Burd* in 1784; and what is a little remarkable, is, that this judgment had slept till about the time execution issued at the suit of *Danedale* against *Sipes*. This circumstance ought to be considered by you. The length of time that elapsed from the entry of the judgment to the issuing of the *scire facias*, is not sufficient to raise a legal presumption that the judgment was paid; but it is for you to presume whether this judgment was not pressed at the instance of *Benjamin Burd*, and whether the sale was not to enure for his use, or to the use of *Keepers*, who purchased of him. The *fi. fa.* at the suit of *Sanderson* issued regularly; a *vend. exp.* and *alias* were issued, upon the latter of which the sheriff returns a sale to Mr. *Riddle*; but an entry appears on the execution docquet in the handwriting of Mr. *Breck*, a clerk in the office, at *April* term 1798, *levy set aside*. In *July* 1798, an inquisition was held, and the land condemned. What is the operation of all this? It has been alleged that this entry was made by mistake, and that it was not the levy, but a former inquisition that was set aside. But the defendant has failed in proving this allegation. It has been urged by the defendant that at this time the purchaser is not to be affected by the entry on the docquet, and that this jury cannot inquire into the regularity of the sale. The act of assembly says that the title of the purchaser shall not be affected by the reversal of the judgment, on which the sale shall be had; but that is not the case before us. We must take the record to be true; the levy was set aside, and therefore the *venditioni exponas* was a nullity. The person who purchased, was the attorney of the plaintiff, and must have been conscious of this fact, though he might have forgotten it; the levy having been set aside, the sale falls of course.

But it has been urged that the legal title having been vested in *George Burd*, by patent, in the year 1794, the plaintiff cannot recover. If we are right in what we have before said, that *Benjamin Burd* acted as guardian of *E. Walker* in taking out these warrants, the defendant cannot set up a right in a third person, which was procured by her guardian.

It is the unanimous opinion of the Court, that the plaintiff

1809: is entitled to recover the whole of the land described by the two warrants.

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To this charge the defendant's counsel excepted, and the jury found for the plaintiff. A motion was then made for a new trial, the reasons for refusing which, the Court reduced to writing, and filed of record agreeably to the 25th sec. of the act of 24th February 1806. 7 St. Laws 345. These reasons came up with the record; but from the judgment of this court, it will be seen that they were immaterial.

S. Riddle and Ross, for the plaintiff in error, argued the cause upon the following exceptions: upon which, with others, they relied for the reversal of the judgment.

They contended that the court below had erred,

1. In the admission of *B. Burd's* administration account in evidence.

That they had also erred in their charge to the jury, in giving their opinion

2. That the warrants taken out by *B. Burd* must be presumed to be for the use of *Elizabeth Walker*.

3. That the defendant had failed to prove that the entry on the execution docket was made by mistake.

4. That the plaintiff was not barred by the statute of limitations.

5. That the plaintiff was entitled to recover.

That there was error appearing upon the record

6. In the refusal of a new trial.

And that the charge was erroneous, in the opinions given upon these additional points,

7. That *Sipes* had such an estate as could be taken in execution.

8. That an inquisition was not essential to give validity to the sale of *Sipes's* estate.

9. That the sale, after the return day of the *venditioni exponas*, was not void; and

10. That the sale to *Samuel Riddle* was void, and passed no title, because the levy had been set aside.

Baldwin for the defendant in error, answered that the

1st Exception was not to be maintained, because the account was competent evidence to shew that *B. Burd* had not, by any payments for *John Burd's* estate, entitled himself to the beneficial interest in the land. That the suit was in fact between the plaintiff and *Benjamin Burd*, whose interest the tenant in possession represented; for *Benjamin Burd* had taken out the warrants and patent in the name of his minor children, sold the land to *Keepers*, and was the principal mover against the plaintiff's title; of course it was his title that was set up against the plaintiff. That the

2d and 3d Exceptions went to the opinion of the court upon matters of fact, which could not be error in law. *Graham v. Gammann*, (a) *Gibson v. Hunter*, (b) *T. Ray*. 405. That the

4th Exception failed in point of foundation, because the plaintiff did not claim under a title by improvement *only*, but as *cestuy que trust* of the patentee *George Burd*. That the

5th Exception was contained in the others. So far as the plaintiff was entitled to recover in point of fact, the opinion of the court in the conclusion of the charge was an opinion upon fact, in which there could be no error. So far as it was an opinion upon the law, it merely included the distinct opinions noticed in the other exceptions. That the

6th Exception was a novelty. There could be no error in the refusal of a motion for a new trial; and the act of 1806, made no difference as to what was or was not error, but merely increased the responsibility of the judge by requiring his reasons in writing. That the

7th Was not correct in point of law. *Sipes* was tenant by the curtesy initiate for his own life, or was entitled to the possession and profits as husband, either of which estates was subject to execution. That the

8th Exception proceeded upon a mistake in not distinguishing between such estates as would certainly endure for seven years, and such as might not last a day. The object of the inquest was to deliver the land to the plaintiff, if it would pay the debt in seven years; but where the defendant did not

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(a) 2 *Caines* 108.(b) 2 *H. Black.* 205.

1809. own the land for seven years certain, the inquest was useless. That the

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9th Exception fell with the 8th, for where there was no occasion for an inquest, there was none for a *venditioni*. The practice however had been to sell after the return day. The 10th Exception supposed the purchaser to be protected by act of assembly, or that a levy was not necessary. The act protected the purchaser at sheriff's sale from a reversal of the judgment, but not from the consequences of a sale without authority. The levy was essential to the sale, if it was set aside there was no authority for the sale; there was in fact no sale, and nothing passed.

TILGHMAN C. J. Delivered the Court's opinion.

This is a writ of error to the Court of Common Pleas of Bedford county. In the course of the trial the defendant took exceptions to the opinion of the Court, respecting the admission of some testimony, and respecting several points of law mentioned in the judge's charge to the jury. To understand these exceptions, it is necessary to state some of the evidence inserted in the record.

[Here the Chief Justice stated the evidence.]

1. The first exception to the Court's opinion, was that the plaintiff below was permitted to give in evidence the administrator's account, settled by *Benjamin Burd*, on the estate of his father *John Burd*.

The court are of opinion, that it would be going too far to say that this account might not have been material evidence. As the plaintiff below claimed under a trust in favour of *E. Walker*, it might be of consequence that the jury should know the situation of old *John Burd's* estate; for if *Benjamin Burd* had paid away correctly all the personal estate, and likewise advanced money of his own to discharge his father's debts, it might have been said that he had a right to appropriate the 150 acres of land devised to *E. Walker*, to his own use. On the contrary there would be no pretence for such appropriation, if he had not made such advances. We think therefore that it was proper to admit the account as evidence.

2. 3. The 2d and 3d exceptions are, that the court below gave their opinion on certain facts more strongly in favour of the plaintiff than the evidence warranted. This Court are of opinion, that the opinion of a judge concerning facts delivered in his charge, is not the object of a writ of error. The jury, not the court, are triers of facts. The judge may intimate his opinion, but the jury are not bound by it. If the judge in charging the jury, expresses an opinion on facts not warranted by the evidence, it is very possible that the verdict may be influenced by it; but we know of no other remedy than by an appeal to the candor and justice of the court, by a motion for a new trial.

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4. The 4th exception is, that the court below delivered their opinion, that the act of limitation (26th March 1785,) was no bar to the plaintiff's ejectment. If the plaintiff below had claimed under an improvement right *only*, his ejectment could not have been supported, unless there had been possession within seven years before the suit was brought; but inasmuch as the plaintiff claimed under the *patent*, we are of opinion that he was not barred by the act of limitation.

5. The 5th exception is, that the court went too far in giving their opinion to the jury, that the plaintiff was entitled to recover. This must be considered as a mixed opinion on law and fact. As to the *law*, it was no more than the general result of the court's opinion, on the several particular points to which the judge had spoken in his charge. Supposing therefore that there was no error in the opinion delivered on those particular points, this court do not think that there would be error in the general opinion, expressed in the conclusion of the charge.

6. The 6th exception is, that the court refused to grant a new trial, on the motion of the defendant below. This exception involves the consideration of the act of 24th February 1806, sec. 25. By this section it is enacted, that in all cases in which the judges holding the Supreme Court, Court of Nisi Prius, Circuit Court, or presidents of the courts of Common Pleas, shall deliver the opinion of the court, if either party shall require it, it shall be the duty of the said judges respectively to reduce the opinion so given with their reasons therefor, to writing, and file the same of record in the cause. The counsel for the plaintiff in error, have con-

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cluded that by virtue of this law, every opinion delivered by the court upon every motion in a cause, before or after trial, may be reviewed by the superior court on a writ of error. This construction would lead to such delay, expense and vexation, that it is not to be adopted, unless it manifestly appears that such was the intention of the legislature. It is urged that there is no use in putting an opinion on record, but for the purpose of having it reviewed by a superior court. But if this only was the object, why are the reasons for the opinion directed to be put on record? It appears to us that this provision was intended to increase the responsibility of judges in making their decisions. It must excite great caution, when the name of the judge, his decision, and his reasons are placed on record. That that was the object of the legislature, may be strongly inferred from this circumstance, that the law is expressly applied to the judges holding the *Supreme Court*, from which there is *no appeal*.

As to motions for new trials, they are often founded, not upon strict laws, but upon equitable circumstances, in which much is left to the discretion of the judge. New trials have been refused when verdicts have been directly against law, in cases where the plaintiff's claim has been of a very hard nature, or where the matter in dispute has not been worth the expense and trouble of another trial; or on the party in whose favour the verdict has been given, consenting to conditions which the court has judged reasonable; such as not taking advantage of the act of limitation, if the plaintiff should bring a new ejectment. Sometimes new trials are asked, because the charge of the court has been against law. There is no occasion for an appeal there, because the party complaining may except to the court's opinion, and carry the point before the superior court by writ of error. Sometimes the verdict is alleged to be against evidence. If that was to be the object of a writ of error, the whole evidence must be placed on the record. Besides, a writ of error founded on a mistake of the jury in deciding facts, would be a novelty in our jurisprudence. In the Circuit Court indeed, on motions for new trials, an appeal lies to the Supreme Court by the act of assembly establishing the circuit courts; but these circuit courts are held by one of the judges of the Supreme Court, just as the courts of *Nisi Prius* formerly were, and in case

of an appeal on a motion for a new trial, the evidence is not placed on record, but the judge before whom the cause was tried, reports it from his notes. In short the business is conducted just as it used to be, when a motion in bank was made for a new trial of a cause which had been tried at *Nisi Prius*. Upon the whole the court are clearly of opinion, that the act directing the judges of all courts, to reduce their opinions to writing, and file them of record at the request of either party, makes no alteration as to those matters which are the objects of revision in this court by writ of error. It was decided by the High Court of Errors and Appeals at their last session, that a writ of error did not lie on the decision of the Supreme Court on a motion unconnected with the trial of a cause. We are therefore of opinion that there was no error of which this court can take cognizance, in the refusal to grant a new trial.

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7. The 7th exception is, that the estate of *Sipes* was not such as could be levied on and sold by execution. We think there is no weight in this exception. The husband is entitled to the possession and use of his wife's land during the coverture, whether he has issue or not; but here he had issue. He may alien his interest, and of consequence it may be taken in execution for his debts.

8. The 8th exception is, that no inquisition was held before the sale of the land taken in execution. To this it has been well answered that no inquisition was necessary. The only use of an inquisition is to ascertain whether the rents and profits will discharge the judgment in seven years; in which case the land is not to be sold, but delivered to the plaintiff till the judgment is satisfied. But where the defendant has an uncertain interest, such as an estate for life, it is unknown, whether it will last seven years, and consequently it cannot be delivered for seven years. This point has been decided by this court long ago.

9. The 9th exception is, that the sale was not made until after the return of the *venditioni exponas*. It has been so common a practice to advertize the sale of lands on a day previous to the return of the *venditioni exponas*, and to continue the sale by adjournment until after the return of the writ, that this court would hardly think themselves justified in determining such sales to be void. But in the present case where

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no inquisition was requisite, it deserves to be considered whether a writ of *venditioni exponas* was necessary, and whether the sheriff might not sell by virtue of the *fi. fa.* which commands him to make the debt out of the defendant's lands and tenements. On this however the court would not be understood to express a decided sentiment.

10. The 10th exception is to the court's opinion, that the sale to *Samuel Riddle* by virtue of the *venditioni exponas* on the judgment against *John Burd's* executors was void, because the court had set aside the levy on *John Burd's* land, previous to the issuing the writ of *venditioni exponas*. The record was produced, shewing an order of the court to set aside the levy. The defendant below endeavoured to prove that this entry was made by mistake, and that the court never made an order to set aside the levy. The court below told the jury that the defendant had failed in his proof. Whether he failed nor not, is not a matter for our consideration. It was a fact to be decided by the jury. All that we have to determine is, whether the sheriff's sale was good, supposing the court had set aside the levy. Our opinion is that in such a case the sale was void, the *venditioni exponas* having issued contrary to the order of the court. We have an act of assembly providing that purchasers at sheriff's sales shall not be affected by the reversal of the judgment under which the sale was made. But there is no law protecting the purchaser in a case like the present. It is obvious that the debts of old *John Burd* must be paid in the first instance before his devisees can take under his will. But Mr. *Riddle* must remove the present legal impediment, before he can recover against the purchaser under a devisee.

Several other exceptions were taken by the counsel for the plaintiff in error, on which the court do not think it necessary to give an opinion, because they are founded on points on which no opinion was given by the court below. We are now deciding on a bill of exceptions, and are confined to the exceptions taken on the trial, or such points as are stated by the judge in his charge to the jury. It is not like the case of a special verdict, where the plaintiff cannot recover unless every fact necessary to complete his title appears on the record. Perhaps if the additional points now made, had been urged on the trial, they might have been obviated by new

evidence on the part of the plaintiff below. Indeed it does not certainly appear that all the evidence actually given is placed on the record.

On the whole the court are of opinion that the judgment of the Court of Common Pleas of *Bedford* county be affirmed.

Judgment affirmed.

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WRIGHT and another *against* The Lessee of SMALL.

IN ERROR.

Pittsburg,
Wednesday,
September 6.

A MOTION for a new trial was made by the plaintiff in error in the Common Pleas of *Mercer* county, and overruled; and at his request, the court gave their reasons in writing, which were entered on record, and removed by writ of error.

The decision of the Common Pleas upon a motion for a new trial is not the subject of a writ of error, notwithstanding their reasons may be reduced to writing, and filed of record, agreeably to the act of assembly.

A. W. Foster for the plaintiff in error, now argued that there was error in the reasons and decision of the Common Pleas upon the motion for a new trial. But *the court*, without hearing *Baldwin* for the defendant in error, affirmed the judgment, saying that there could be no error in an inferior court's refusing to grant a new trial, notwithstanding their reasons were entered of record; as had been decided in *Burd v. Dandale's Lessee (a)*.

Judgment affirmed.

Lessee of MATHERS *against* AKEWRIGHT.

Pittsburg,
Thursday,
September 7.

IN this case a verdict was taken for the plaintiff at the *Mercer* Circuit in *September* 1808, subject to the opinion of the court upon a point reserved; and judgment being entered for the plaintiff, the case came to this court by appeal. If the plaintiff in ejectment is bound in equity to make title to the defendant, for a part of the premises, the court will do the defendant justice by staying execution upon the judgment until the title is secured.

(a) *Supra*, 91.

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A certain *John Kean* who had commenced a settlement upon the tract of land in question, articted to convey 100 acres of it to the defendant, who agreed to make settlement &c. in five years, and to clear and fence four acres in *Kean's* part. *Kean* afterwards left the state, and the defendant caused a survey to be made in his own name, and said he would have the whole tract. The creditors of *Kean* took out a domestic attachment against his property, and by virtue of it sold the tract to the lessor of the plaintiff. The defendant then sold his 100 acres to one *Farrell* to whom he gave possession, and he retained possession of the residue himself. The question was whether the plaintiff could recover, as he had not completed the title of *Farrell* before the ejectment was brought.

Baldwin for the defendant contended that as the plaintiff asked equity in this suit, he ought not to be permitted to take away the defendant's possession, until the 100 acres were confirmed, or security given to make the title good.

Foster contra insisted that the defendant had disavowed the article of agreement, by getting a survey in his own name, and claiming the whole land; and of course that he had no equity.

PER CURIAM. The defendant ought to be secured in the 100 acres according to the article; and that may be done by ordering stay of execution until the title is secured. But he ought to pay costs, because the first act of misconduct came from him, in disavowing the article, and endeavouring to secure the whole land for himself.

Judgment affirmed, with stay of execution, until the title of the defendant to the 100 acres should be secured according to the article of agreement.

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Pittsburg,
Thursday,
September 7.

Lessee of GRATZ against EWALT.

A PPEAL from the decision of the late Judge *Smith*, at a Circuit Court for *Allegheny* in November 1805.

The case reported by his Honour, so far as it is material to the point decided here, was shortly this: The lessor of the plaintiff claimed the premises in the ejectment, under a deed from the sheriff of *Allegheny* county, the same having been sold under a judgment obtained in 1774 against *George Croghan*, to whom it had been granted with other land by the *Indians* before the year 1761, and who was also the proprietor of an application of the 1st April 1769, for 1500 acres including the land in dispute.

The defendant was likewise a purchaser at sheriff's sale. On the 25th January 1771, a certain *Jonathan Plummer* mortgaged the premises to one *Henry Heath*. In 1783 *Heath* obtained a judgment upon the mortgage; and upon a *levari facias* in the same year, the land was sold to the defendant. To shew the title of *Plummer* the mortgagor, testimony was introduced to prove, that as to this part of *Croghan's Indian* grant and application, he was a trustee for *Plummer*, who had settled on the land in 1761, and was entitled to the equitable estate by contract with *Croghan*; and for this purpose, the deposition of *Plummer* himself was offered in evidence. It was opposed upon the ground of interest, principally in consequence of *Plummer's* covenant in the mortgage, under the words "*grant, bargain, sell*," which were said to be a general warranty, of which the purchaser at sheriff's sale might avail himself; but his Honour admitted the evidence, reserving the point; and finally charged the jury, that if they were satisfied that *Croghan* was a trustee for *Plummer*, their verdict should be for the defendant, as it was clear law that an equitable estate might be mortgaged. The jury found for the defendant; and Judge *Smith*, being perfectly satisfied with the verdict, overruled a motion for a new trial which was made as well upon the reserved point,

The words "*grant, bargain, sell*," do not, under the act of 1715, amount to a general warranty, but merely to a covenant, that the grantor has not done any act, nor created any incumbrance, whereby the estate granted by him, may be defeated; and therefore a grantor is a good witness to support a title derived under a mortgage from him containing those words.

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as upon the general objection that the verdict was against law and evidence.

The appeal was argued at last *September* term.

Woods for the plaintiff made two points. 1. That by the evidence, it appeared that *Plummer* had no estate to mortgage. 2. That *Plummer* was interested to support the defendant's title, inasmuch as he had mortgaged by the words "*grant, bargain, sell,*" which under the act of 1715 were a general warranty.

The *first* point involved the evidence at large, which it is not material to detail.

Upon the *second* he argued, that if every phrase in the sixth section of the act of 1715, 1 *St. Laws* 111, was allowed its due weight, which was a maxim in the construction of statutes, it must necessarily follow that the words were a covenant against all the world. By the act, they are an express covenant in the first instance, that the grantor is seized of an "*indefeasible estate in fee simple,*" words which contain no restriction or exception, and which cannot without absurdity admit of any, because whatever the exception is, it must destroy the whole of the covenant. The second member of the covenant is, "freed from all incumbrances done or suffered by the grantor;" and the third, "as also for quiet enjoyment against the grantor his heirs and assigns." To couple the second member with the first, and thereby to make it a simple covenant against the acts of the grantor, does not qualify the first, but entirely destroys it; for it is no longer a covenant that the grantor has an indefeasible fee simple, but merely that he has done nothing to defeat it. Neither is the second included in the first, which, if it were the case, might furnish a plausible argument for qualifying the one by the other. There may be incumbrances which do not operate as a defeasance of the fee simple, for which it was proper to furnish the grantee with a writ of covenant; and if in any case the two branches of the covenant can perform different offices, the rule of construction before referred to, must compel the court to treat them as distinct covenants. Certainly the opinion has prevailed, that a general warranty was intended by the law; and a contrary

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decision may very much affect the value if not the security of titles. The law was intended to produce extensive benefit; but to derive from it no relief except against the acts of the grantor, is to make it give the grantee very little that he would not have had without it. If it is a general warranty, then as it runs with the land, the purchaser at sheriff's sale may upon the defeat of his title, sue the covenantor, and of course the latter was plainly interested to prevent an eviction.

Ross for the defendant argued, that although the section was ambiguously framed, yet the relation in which the first two clauses of the covenant stood to each other, and the terms of the second clause, shewed their connexion to be inevitable, and that the whole was but a single covenant. The second clause is not complete in itself, but relates to something which goes before. The antecedent is the estate in fee simple. Unless this is joined with the succeeding phrase, there is nothing which the grantor covenants to be freed from incumbrances done or suffered by himself; and if it is joined, then it is a single covenant that the estate in fee simple is free from incumbrances by him. To argue that there is one covenant that the grantor is seized of an indefeasible estate in fee simple, and another that he is seized of an estate in fee simple freed from all incumbrances by himself, is therefore to make the words first a covenant against all the world, and then against an individual, which is contrary to the plaintiff's own rule of construction, since it entirely destroys the use of the second clause. The language of the third clause is a further argument for the connexion and likewise for the restriction of the first two. It is limited in its objects; "as also for quiet enjoyment against the *grantor his heirs and assigns*." To confine the covenant for quiet enjoyment after a general warranty, seems absurd; but after a special warranty, is perfectly correct. In fact the course of the legislature has been, after starting with terms which by themselves might have a very general operation, to follow them with terms which could consist with nothing but a special warranty. If however the covenant amounts to a general warranty, still *Plummer* had no interest. The mortgage was merely a pledge as security; and at the sheriff's sale nothing was sold to the purchaser but *Plummer's* interest

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in the land. There is no instance in which an action has been brought against a defendant, in consequence of the defect of his title to land sold under execution. He sells nothing, he conveys nothing himself; the whole is taken from him and passed away by the hand of the law.

Cur. adv. vult.

Upon this day the judges delivered their opinions.

TILGHMAN C. J. As to the *first* point, I feel no difficulty. The defendant offered evidence of weight, to shew that *George Croghan* was a trustee for *Phummer*; and the judge who tried the cause, left the matter to the jury on the evidence, and was well satisfied with the verdict. There can be no reason for a new trial upon that ground.

The second point requires more consideration. It is singular that the construction of words, concerning which there has been a difference of opinion, and which have been introduced into thousands of deeds since the year 1713, should never have been settled by a judicial decision. But such is the case. I am well informed that, at the time of our revolution, it was the opinion of some gentlemen of eminence at the bar, that the words "grant, bargain, and sell," created a general warranty, while others of equal character entertained a contrary opinion. It was this diversity of sentiment which I suppose (as I mentioned in the case of *Bender v. Fromberger*, 4 Dall. 440.) induced the conveyancers of *Philadelphia* to introduce the clause of special warranty, which is very generally found in deeds in that city. I am aware that in the *Lessee of Ballist v. Bowman*, before the late C. J. *Shippen* and Judge *Smith* in the Circuit Court of *Northampton* county, May 1802, this very point was brought before the court, on an objection to the competency of a witness who had conveyed the land in dispute, by a deed containing the words "grant, bargain, sell;" and according to Judge *Smith's* note of that case, the court said that those words created a warranty "only against the grantor and those claiming under him, or against any act done by the grantor;" but in order to avoid all difficulty a release was executed to the witness, so that I do not consider the point as having been solemnly decided.

I will consider the act of assembly, then, supposing the question to be undecided. It is enacted "that in all deeds to be recorded in pursuance of that act, whereby an estate of inheritance in fee simple should be granted to the grantee and his heirs, the words *grant, bargain, sell*, shall be adjudged an express covenant to the grantee his heirs and assigns, *to wit*, that the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances done or suffered from the grantor, (excepting the rents and services due to the lord of the fee) as also for quiet enjoyment against the grantor his heirs and assigns, unless limited by express words contained in such deed." The meaning is not clearly expressed; but I take it to be a covenant that the grantor had done no act, nor created any incumbrance, whereby the estate granted by him might be defeated; that the estate was indefeasible as to any act of the grantor. For if it was intended that the covenant should be, that the grantor was seized of an estate absolutely indefeasible, it was improper to add the subsequent words "freed from incumbrances done or suffered by him;" these words instead of adding strength, would only serve to weaken what went before. The words, "seized of an indefeasible estate in fee simple," are to be considered therefore, not as standing alone, but in connexion with the words next following, "freed from incumbrances done or suffered from the grantor." I am the more convinced that this was the intention of the legislature, by comparing the expressions in this act, with the 30th section of the *statute 6th Ann. ch. 35.* which contains a provision on the same subject, and was evidently in the eye of the persons who framed our law. The *British* statute makes use of more words, but the intention is more clearly expressed. It declares that the words *grant, bargain and sell*, shall amount to a covenant, that the bargainor, notwithstanding any act done by him, was, at the time of the execution of the deed, seized of an indefeasible estate in fee simple &c. Our law seems intended to express the substance of the *British* statute in fewer words, and has fallen into a degree of obscurity, which is often the consequence of attempting brevity. I can conceive no good reason why our legislature should have wished to carry this implied warranty farther than the *British* statute did; because it has bad effects to an-

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nex to words an arbitrary meaning far more extensive than their usual import, and which must be unknown to all but professional men. It might be very well to guard against secret acts of the grantor, with which none but himself and those interested in keeping the secret, could be acquainted. As for any further warranty, if it was intended by the parties, it was best to leave them to the usual manner of expressing it in plain terms.

These are my ideas of the construction of this act of assembly, divested of all authority from the opinion of others. But although we are without the authority of an adjudged case, we have the opinions of Chief Justice *Shippen* and Judge *Smith*, to which I pay great respect, in the case which I have mentioned. Upon the whole of this case, I am of opinion that the Circuit Court was right in rejecting the motion for a new trial.

YEATES J. The first reason assigned for this appeal, is, that the deposition of *Jonathan Plummer* was admitted in evidence to the jury. He was examined on the 29th May 1798, by the commissioners appointed on a bill to perpetuate testimony. Having been in the peaceable and quiet possession of the lands in controversy since 1761, and made many valuable improvements thereon, he mortgaged the same to *Henry Heath* on the 25th January 1771, to secure the payment of £14*l.* 4*s.* 10*d.* Virginia currency, with lawful interest. This mortgage, containing the words *grant, bargain, sell*, to the said *Henry Heath* and his heirs, in the usual form, was proved at a Virginia court on the 25th August 1777, when that state claimed and exercised jurisdiction in the western parts of *Pennsylvania*, and was recorded on the same day. It is objected that the witness was interested at the time of his examination, under sec. 6. of the act "for acknowledging "and recording of deeds," passed in 1715; and that having granted an estate in fee to the mortgagee, the technical words used therein operated in law, as an express covenant, that he had a good and indefeasible right in the lands conveyed by way of security; and if therefore the sheriff's vendee should happen to be evicted by an elder and better title, that he would have his remedy over against the mortgagor.

The words of this section are very similar to those used in section 30 of the stat. 6 *Ann. c. 35.* which are as follow: "In

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“ all deeds of bargain and sale, hereafter inrolled in pursu-
 “ ance of this act, whereby any estate of inheritance in fee
 “ simple is limited to the bargainee and his heirs, the words
 “ *grant, bargain and sell*, shall amount to, and be construed
 “ and adjudged in all courts of judicature, to be express
 “ covenants to the bargainee his heirs and assigns, from the
 “ bargainor for himself, his heirs, executors and administra-
 “ tors, that the bargainor, *notwithstanding any act done by*
 “ *him*, was at the time of the execution of such deed, seized of
 “ the hereditaments and premises thereby granted, bargained
 “ and sold, of an indefeasible estate in fee simple, free from
 “ all incumbrances, (rents and services due to the lord of
 “ the fee only excepted) and for quiet enjoyment thereof
 “ against the bargainor his heirs and assigns, and all claiming
 “ under him, unless the same shall be restrained by express
 “ particular words contained in such deed; and that the
 “ bargainee, his heirs, executors, administrators, and as-
 “ signs respectively, shall and may in any action to be
 “ brought assign a breach, or breaches thereupon, as they
 “ might do in case such covenants were expressly inserted
 “ in such bargain and sale.”

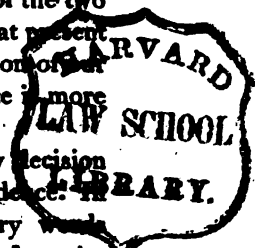
There are some variances between the words of the two sections; the consideration whereof seems to me at present to be immaterial: but I have no doubt of this section of the act being taken from the statute, though the statute is more verbose.

I have not been fortunate enough to discover any decision on this branch of the *British* statute, as to evidence: in *Man v. Ward* (a) Lord Hardwicke says the very words *grant and convey* imply a warranty, and covenant for quiet enjoyment at law; and therefore one could not be examined as a witness to overturn and invalidate the right and title he had granted. In *Browning v. Wright* (b) Lord Eldon lays it down, that the words *grant, bargain, sell, enfeoff, and confirm*, import a covenant in law. But in a late case of *Frost et al. v. Raymond* (c) determined in the Supreme Court of *New York* in 1804, it is abundantly shewn, that though the words *grant and enfeoff* amount to such covenant in an estate for years, yet to apply them to an estate in fee, is opposed to the whole stream of the book authorities. In that

(a) 3 Atk. 228.

(b) 2 Bos. & Pul. 21.

(c) 2 Gaines 188.



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case it was adjudged, that the words *grant, bargain, sell, alien, and confirm*, did not imply a covenant of warranty in a deed, conveying lands in fee simple. The word *give* amounts to an implied warranty for the life of the feoffor. And so of the word *exchange* in partition. I thoroughly agree with Judge *Livingston*, that in practice, every purchaser of lands, who intends to have recourse in case of eviction to the former proprietor, takes care to have inserted in the instrument of conveyance, the necessary covenants for that purpose, thereby ascertaining the precise extent of his liability. In conveyances of real estate, there must always be danger in implying any thing, that is not stipulated in clear and precise terms. This is the safest way of determining the extent of a grantor's responsibility.

But it is said that the legislature have imparted a degree of efficacy to the words *grant, bargain, sell*, which they did not possess at common law; and that in grants of estates in fee simple, "they shall be adjudged an express covenant that the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances done or suffered from the grantor, as also for quiet enjoyment against the grantor his heirs and assigns, unless limited by express words contained in the deed." The sentence is read, as if the words *freed from incumbrances &c.* were a distinct covenant from the words preceding it, enlarging the liability of the grantor. But the natural, grammatical sense of the section is, that the expressions *freed from incumbrances &c.*, qualify and restrict the operation of the words going before, and the latter clause of quiet enjoyment being confined to the acts of the grantor his heirs and assigns, strongly fortifies this construction. In other words, the provision was intended as a covenant on the part of the grantor, that he had not previously incumbered the lands, and that neither he, his heirs, or assigns, should molest or disturb the grantee. It was remarked during the argument, that a different construction had generally prevailed, which it might be highly inconvenient now to unsettle. We therefore postponed giving any decision on the subject at the last term, in order to have time to consult the elder counsel at the bar. I have personally made inquiry of many of those gentlemen, both in the city and country, and they have uniformly asserted, that as far

as their experience has gone, the clause in question has received no other construction than a covenant of special warranty, freed from incumbrances; that scriveners have generally used the words *grant, bargain, sell*, as mere expressions of course; and that though sometimes releases have been executed at bar, previously to offering such grantors as witnesses, it has been done to save time, and preclude all pretext of dispute. I have likewise seen the notes of a trial in the Circuit Court of *Northampton* county, on the 19th May 1802, before the late Chief Justice *Shippen* and Judge *Smith*, between the lessee of *Stephen Ballot* and *Bernard Bowman*, wherein *Jacob Seyberling*, through whom the defendants claimed by divers mesne conveyances, was offered as a witness to support the title of the lands, and his competence was objected to on the part of the plaintiff, on the ground of the words *grant, bargain, sell*, being used in his conveyance; but the objection was overruled without difficulty; and the then Chief Justice declared, that those words within his experience had never been deemed to amount to more than a covenant against the vendor and his acts, and those claiming under him. I am therefore of opinion that the deposition of *Jonathan Plummer* was properly received in evidence, and that the exception went to his credibility, not to his competence.

The other grounds of appeal are, that the verdict for the defendants was against law and evidence. It appears from Judge *Smith's* statement of the evidence, that *George Croghan* claimed a large body of land under an *Indian* grant, and permitted *Jonathan Plummer* to take possession of a specified parcel thereof, to be paid for at a future day, agreeably to the judgment of arbitrators, according to its value in an uncultivated state, when *Croghan* should obtain the title. The possession was obtained by *Plummer* in 1761, with the permission of Col. *Henry Boquet*, the commanding officer to the westward, and he made considerable improvements thereon. *Croghan* afterwards, on the 1st April 1769, procured a special order for 1500 acres of land on the river *Ohio*, which recited that six families had lived thereon, improving the same since 1762; and in pursuance thereof surveys were made in the month of *June* following; one of which included the lands in dispute. In 1765 *Croghan* acted

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as the agent of *Plummer* in leasing the land, and paid him the rent. In 1771 *Plummer* mortgaged the premises before stated to *Henry Heath* with the knowledge and approbation of *Croghan*, and afterwards sold the same lands to *Croghan* for 300*l.* subject to the equitable claim of the mortgagee, which *Croghan* agreed to pay, but no written conveyance was executed. In fact *Croghan* retained in his hands a part of the purchase money in order to pay the mortgage. A judgment was obtained in July term 1783 on this mortgage in *Westmoreland* county, and the lands were sold under a *levari facias* to the defendant.

The lessor of the plaintiff claimed under a sale made by the sheriff in 1801 under sundry judgments obtained by *Croghan's* creditors against him in 1774.

The question submitted to the jury on the whole evidence was, whether *Plummer* had such an interest in the lands as he could mortgage, or whether the entire title was in *Croghan*. The credibility of the parol testimony was wholly submitted to the jury; and they were instructed that if they were satisfied that *Plummer* was not the tenant of *Croghan*, and that the latter was trustee of the former, by engaging to take out the legal right for him, that the defendant ought to prevail under all the circumstances of the case; because if the equitable title was in *Plummer* on the 25 January 1771 and previous thereto, the judgments against *Croghan* in 1774 could not affect the lands. But if they found that both the legal and equitable title were always in *Croghan*, then *Plummer* could have no estate whatever in the lands, which he could mortgage, and consequently in such case, the plaintiff would be entitled to recover. The jury upon the whole matter have found a verdict for the defendant, and the judge who tried the cause has declared his perfect satisfaction therewith. I can see no cause of dissatisfaction with the charge or the finding of the jury, and on the whole, I am of opinion that the judgment of the Circuit Court should be affirmed.

BRACKENRIDGE J. Having been of counsel in this cause, I did not sit upon the trial, though on the circuit with Judge *Smith*; but as it is now decided, I may express my concurrence. When on the circuit with the late Chief Justice *Shippin*, I conversed with him with regard to the construction of the act of assembly; and I understood, that since he

had had any knowledge of the law in *Pennsylvania*, the construction of the act had been, that the covenant in question was a special warranty.

Judgment affirmed.

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GRATE
v.
EWALT.

Lessee of M'KINZIE and another *against* CROW
and others.

Pittsburg,
Friday,
September 8.

THIS was an appeal from the decision of Judge YEATES, at the *Bedford* Circuit Court in *October* 1807.

A paper, purporting to be a survey on an application belonging to an assistant deputy surveyor, found among the assistant's papers at his death, but without any signature, or any evidence about it that it had been seen and recognized by his principal, is not evidence of a survey.

A survey made by an assistant deputy surveyor for himself, is of no validity until it is recognized by his principal. *Qu.* Whether a survey made by a deputy surveyor for himself has any validity until it is accepted by the surveyor general.

The lessors of the plaintiff claimed the premises in the ejectment under an application of the 24th *February* 1767, for 300 acres, in the name of *Thomas Thompson*, who by deed, in consideration of five shillings, conveyed to *Robert M'Kinzie*. It was proved, upon the trial of the cause, that *Robert M'Kinzie* was an assistant of *Richard Tea*, deputy surveyor, and that in the year 1767, he made surveys for *Tea* in that part of the country where the land in dispute was situated; and there was some proof of marked trees in the lines claimed by the plaintiff, but it did not appear at what time the lines were marked. In order however to prove the precise survey, the plaintiff offered in evidence a paper said to have been found among the papers of *Robert M'Kinzie*, who died in 1777. On this paper was laid down a survey on the application of *Thomas Thompson*, and a return by which the survey was said to be made on the 15th *May* 1767. But the return was not signed, nor did it appear that it had ever been in the office of *Richard Tea*, or that any fees had been paid to him, or that he had in any manner recognized the survey. His Honour refused to admit the evidence, and the jury found a verdict for the defendant.

A motion was then made for a new trial upon the ground of the refusal, which was overruled; and the plaintiff appealed to this court, where the point was now argued by *S. Ridge* for the plaintiff, and by *Woods* for the defendant.

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Lessee
of
M^cKinzie
v.
Crow.

TILGHMAN C. J., after stating the facts, delivered his opinion as follows:

It has often been decided that where a deputy surveyor makes a survey, and does not return it, the owner of the warrant or application shall not be prejudiced by the default of the officer. The reason of this is manifest. The surveyor was not the agent of the warrant holder, but an officer appointed by the government, who granted the land. It was his duty to make the return, and if not made, it was his fault. But the case before us is very different. Here is a title set up under the very man who has been guilty of the grossest negligence. I think it would have been more proper in Mr. *Tea*, if he had employed some other person to make the survey on an application belonging to M^cKinzie; but perhaps he did not know that M^cKinzie owned it. Be that as it may, the survey made by M^cKinzie for himself, was of no validity till recognized by his principal. The paper offered in evidence has no official mark about it. It is signed by nobody. There is no indorsement to make it appear that it was ever filed in any office; and if it was really supposed by M^cKinzie to be an actual survey, it is unaccountable that he should have suffered it to remain ten years in his own possession, when he must have known that it was his duty to return it to his principal. From the circumstances of the case, there is a strong presumption that M^cKinzie did not consider the paper as of any validity; and I think it would be of very dangerous consequence, if after forty years, it should be suffered to be set up as an official paper. This court has gone great lengths in the admission of papers found in the possession of the family of deceased officers, in order to throw all possible light on the trial of a cause; but they have never gone so far as is asked in this case. I am of opinion that the evidence was properly rejected, and that the judgment of the Circuit Court be affirmed.

BRACKENRIDGE J. The paper in question is but evidence of an invalid act. Admit the fact of a survey by M^cKinzie for himself. The question will be, had he power to make such a survey? It is not within the commission to survey for himself. It is not within the instructions of the surveyor general to the deputy to survey for himself *the deputy*. It is by

the *ratihabitio* only of the surveyor general, or the proprietaries themselves, that the survey could become valid. It has not reached that point; and is therefore without foundation to support it. Had this paper purported to be a survey made for a third person, it would have been evidence. Where a survey has been actually made on the ground, that is, where traces of a survey are to be found, I scarcely know any thing that has not been admitted, found in the office of a surveyor, that has had relation to it. I might express myself by a strong figure, and say, that almost the *sweepings of an office* had been admitted to go to the jury to be weighed by them under the direction of the court. *Length of time* does not weigh with me in excluding this paper. It is on the ground of being an *invalid* act. There is nothing to make it the act of the surveyor general. It has not been found in his office. There is no mark by *him*, and no handwriting of *his* upon it, so that it could be inferred that he ever saw it, or recognized it. It could not otherwise be considered as having validity.

In the case of a grant, the parties are three; the grantor or vendor, who in this case, was what are called the proprietaries; the grantee or purchaser; and the office to carry that grant into effect. The officer is to be considered in the light of an agent for both. He is employed to measure off the land to be transferred, to locate the application, or warrant. It is not the understanding that he shall do this for himself. It is contrary to good policy to admit it; it has been the source of much mischief to sanction it. The deputy ought not to appear in it; nor the surveyor general as surveying for himself; and it could not be valid until ratified by the owner of the soil expressly, or by necessary implication. The policy of the law will not allow a sheriff or cryer to purchase for himself. It is uniting two characters in the same person, which are inconsistent with each other. It leads to fraud.

We have here, therefore, a document of a survey made without authority prior to the act, and without sanction subsequent. There is but the application to rest upon, and this, without a survey, cannot support an ejectment. It is alleged that the defendant knew of this survey being made upon the ground. But if the survey made was without authority, and invalid, the having knowledge of it cannot affect it. Even the thinking it good cannot make it good. Were the defendant

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plaintiff, this might be alleged as constituting some equity against him, and be in the way of recovering possession. But here he rests on his possession, and the plaintiff must recover by his own strength. He has not made out a good title, unless the survey could be given in evidence; and this survey not being by authority, cannot. Had it gone to the jury, they must have been told that it could not weigh; and therefore why should it go?

Judgment affirmed.

Pittsburg,
Saturday,
September 9.

Lessee of CAIN against HENDERSON.

The grantor of a tract of land, who has not given any warranty, nor practised any deception upon the grantee, is a competent witness to support the title. When the judge who tried the cause is not dissatisfied with the verdict, it must be a very strong case that will induce this court to grant a new trial.

THE defendant moved for a new trial in the Circuit Court of *Greene* county, which was refused by his Honour Judge YEATES; and he appealed to this court for two reasons. 1, Because a certain *Edmund Pollock*, who was the original settler of the tract, part of which was in question, and who sold the land to the person from whom it came to the plaintiff, was admitted as a witness. 2, Because the verdict was against the weight of evidence.

The sale by *Pollock* was by parol without any warranty, or deception upon the purchaser; and Judge YEATES, upon reporting the case, said that he was not dissatisfied with the verdict.

Campbell for the defendant, was about to argue that *Pollock* was an incompetent witness, because as he sold the land, he would be liable to an action in case a part of it was lost. But the court intimated their opinion that the objection could not be supported, as there was no evidence that *Pollock* gave any kind of warranty, or was guilty of any deception in the sale.

Campbell then said, that as he relied principally on this exception, he should proceed no further.

The Court thereupon remarked, that as to the other point, viz. that the verdict was against evidence, it must be a very strong case indeed, which would induce them to order a new

trial, where the judge who tried the cause was not dissatisfied with the verdict.

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Judgment affirmed.

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CAIN
v.

Ross for the plaintiff.

HENDERSON.

MAGEEHAN against the Lessee of ADAMS.

IN ERROR.

Pittsburg,
Monday,
September 11.

THIS case was upon a bill of exceptions to the opinion of the Common Pleas of Beaver county.

Parol evidence is admissible to shew that a course and boundary in a survey and patent are incorrectly stated, and that they are otherwise upon the ground.

A survey and patent of one *Conrad*, which were given in evidence, called for, at the beginning of the tract, a black oak on the state line, thence by the same 130 perches to a post. The plaintiff below offered evidence to prove that the black oak, and the marked line run from the black oak, were not on the state line, but about thirty perches east of it; and this evidence was admitted by the court, notwithstanding the defendant objected to it.

Campbell for the plaintiff in error, argued that the survey and patent were conclusive evidence of the situation of the tract.

But the Court were unanimously of opinion that the evidence was properly admitted, the point having been so ruled many times.

Judgment affirmed.

Semple for defendant in error.

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Pittsburg,
Tuesday,
September 12.

STEWART *against* FOSTER and others.

IN ERROR.

An alien, who has resided in *Pittsburg* one year next preceding an election for borough officers, and has within that time paid a borough tax, is entitled to vote at such election.

THE plaintiff, at an election for borough officers in the borough of *Pittsburg*, in *March* 1809, offered his vote, he being a freeholder in the borough, and having resided therein one year immediately preceding the election, and within that time paid a borough tax. The defendants, who were the inspector and judges of that election, refused the vote upon the ground that the plaintiff was not a citizen, and was not entitled to vote for members of the general assembly.

A case was thereupon made for the opinion of the Common Pleas of *Allegheny*, to try the plaintiff's right; and the judgment of that court being in favour of the defendants, it was brought for revision to this court, by writ of error. (a)

(a) There were two descriptions of persons whose votes were offered and rejected at the borough election in *March* 1809. FREEHOLDERS within the borough, who had resided therein at least one year preceding the election, and within that time paid a borough tax; and INHABITANTS of the borough, who had resided and paid taxes in the same manner as the freeholders. The cases were brought separately before the Common Pleas of *Allegheny*, but neither in that court, nor in this, was there supposed to be any difference between the elective franchise of the different plaintiffs. The opinion of the president of the Common Pleas, was as follows:

Roberts, President. I shall consider the two cases together, inasmuch as they vary in but one point, and that being in my view, altogether immaterial to the decision. A freehold estate can confer no right of voting on those whose situations, in other respects, are incompatible with the enjoyment of the elective franchise.

The question then submitted to the consideration of the court is, whether an ALIEN, having resided in *Pittsburg* one year preceding an election for borough officers, and having, within that time, paid a borough tax, is entitled to vote at such election.

Whether such right exists or not, will depend on the construction of the act of incorporation passed 5th *March* 1804; (a)* and perhaps also upon the "act for the further regulation of the borough of *Pittsburg*," passed 7th *March* 1805. (b)

* (a) 6 *State Laws* 199.

(b) 7 *State Laws* 103.

The point was here argued by *Mountain* for the plaintiff, and by *Wilkins* for the defendants; but as the question turned

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FOSTER.

The words of the act of the 5th March 1804, are—"the *freeholders, housekeepers, and other inhabitants* of the said borough, who have resided within the same at least one year, immediately preceding the election, and within that time paid a borough tax, shall have power to elect, &c.

It will not be contended that the words "*freeholders, housekeepers and other inhabitants*," used in the act, are to be understood in their most extensive import; for if they were so understood, not only alien friends and alien enemies might be included, but also women, minors, apprentices, slaves and servants for years: therefore it is evident, that the letter of the act must be restrained by an equitable construction.

This mode of construing statutes is perfectly familiar to every lawyer.

In some cases the letter of a statute is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter. (c)

That equitable construction which restrains the letter of a statute, is defined by *Aristotle* in this manner: *Equitas est correctio legis generatim lata, quâ parte deficit*, or as the passage is explained by *Perizonius*—*Equitas est correctio quedam legi adhibita, quia ab ea abest aliquid propter generalem sine exceptione comprehensionem.* (d)

The words of 2 West. 2. c. 11. are general, that all bailiffs and receivers, who in passing their accounts before auditors assigned, shall be found in arrear, may be committed to the next jail: (e) yet, if an infant bailiff or receiver be found in arrear, he shall not be committed; for he is not, by reason of his want of discretion, within the equity of the statute.

The intention of the makers of a statute is sometimes to be taken from the cause, or necessity of the making of a statute; at other times from the circumstances. Wherever this can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter. (f)

As means of discovering the intent of the legislature, it is proper to consider, 1st, What the law was previous to the making of the statute; 2d, The mischief which then existed, and which was intended to be remedied; 3d, The remedy which is provided for the mischief; and 4th, The true reason of the remedy.

These latter rules will apply when we come to consider the act of 7th March 1805.

It appears by recurring to the act of incorporation of 5th March 1804, that amongst other things it was required, that the voter should have paid a borough tax, within one year immediately preceding the election. Thus it was put in the power of the corporation, to exclude from the right of voting, all persons except those who were freeholders within the borough. And we find that the corporation were not backward in using this power; for at a meeting of the burgesses and town council, under this act, which took place on the 24th April 1804, and by the 27th ordinance passed

(c) 4 Bac. Abr. 649.—Tit. Stat. 1. 6.

(e) 4 Bac. Abr. 649.—Tit. Stat. 1. 6.

(d) Plow. 465. *Eyton v. Studde.*

(f) Plow. 305.

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exclusively upon the construction of certain acts of assembly, which are particularly stated and explained in the opi-

after the making of the act, it is provided "*that all borough taxes shall be levied and assessed on real property only.*" (g)

It was calculated to excite alarm and dissatisfaction in the minds of citizens, who were gratified to vote at general elections, and some of whom might be seized of valuable freeholds in other parts of the state, thus to find themselves deprived of the elective franchise, in the little community wherein they happened to reside; more especially when they must have seen that the act of incorporation seemed not intended to exclude them, though it might inadvertently have furnished the means.

This exclusion of citizens who held no freehold estate within the borough, was probably the grievance or mischief complained of, and intended to be remedied by the act of 7th March 1805, which provides "*that the inhabitants of the borough of Pittsburg, who shall have resided within the same six months, immediately preceding the election, and who shall in other respects be entitled to vote for members of the general assembly, shall be fully competent to vote at the elections of officers, for said borough.*" (h)

This "*act for the further regulation of the borough of Pittsburg,*" is on the same subject with the act of 5th March 1804. (i)

Now it is a well known rule, in the construction of statutes, that all which relate to the same subject, notwithstanding some of them may be expired, or are not referred to, must be taken into one system and construed consistently. (k)

It has been contended, on behalf of the plaintiffs, that it is inconsistent with the spirit of laws for the incorporation of boroughs, to exclude aliens from the elective franchise; and that in *Europe* they enjoy it. If such be the law in any part of *Europe*, or if amongst any civilized nation existing, aliens of every description are permitted to interfere in municipal regulations, it has not been shewn, nor have we been able to discover it.

It is true that foreigners may become members of certain corporations established in *England*, as well as in this country, for the purposes of car-

(g) *Ordinance book*, p. 68. *Ord. No. 24.*

(h) 7 *State Laws* 103.

(i) The act of 7th March 1805 seems to have been passed in consequence of a petition of a number of the inhabitants of *Pittsburg*, presented by Mr. *Robinson* in the house of representatives, the 15th February 1805, in which it seems the grievance complained of was, that housekeepers and others qualified to vote at general elections, not being freeholders, were not permitted to vote for borough officers. And it is remarkable that the petitioners pray that the ordinance (probably meaning that whereby they were excluded) might be repealed by an act of the legislature. *Minutes of the H. Representatives*, p. 337.

At the next meeting of the town council after the passing of the act of 7th March 1805, to wit, on the 6th April 1805, the ordinance of the 24th April 1804 was repealed. *Ord. book*, p. 60.

(k) 4 *Bac. Abr.* 647. *Tit. Stat. I.* 28.

nions of the judges, it becomes the less important to give a note of the argument.

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rying on trade, manufactures, or commerce; and may possibly be admitted, in some instances, to enjoy like privileges in such private communities, with other members who are citizens. In the few instances, however, which have fallen under my notice, in the *United States*, and in the state of *Pennsylvania*, they are *excluded* from such privileges, even in such private associations, of which the interest of the community seemed to require, that they should be invited to become members.

Thus by the act incorporating the bank of the *United States*, none but citizens are eligible as directors.

In the bank of *Pennsylvania*, none but stockholders, being citizens of the commonwealth, are eligible as directors: nor can any other act as a proxy.

In the bank of *Philadelphia* a like regulation is established.

And in the "Farmers and Mechanics' bank", (established at the last session of the legislature) none but stockholders being citizens, are eligible to the directorship.

Now, if in these private associations, it is not considered expedient to put aliens upon a footing with citizens, how much more cogent are the reasons for excluding them from participating with the citizens, in regulating the affairs of corporate towns?

The incorporation of towns has for its object, municipal regulation; the laws which apply to the state at large, being inadequate to the regulation of the interests and local concerns of a number of men collected together in small communities, and pursuing modes of life different from the rest of their fellow citizens.

Every such community hath the power to regulate trade, and the conduct of all residing within their precincts. It is true their laws or ordinances must not be *contrary* to the laws of the state, but they may be, and frequently are variant from them.

There are in *Pennsylvania* upwards of thirty incorporated towns. What an influence would be placed in the hands of foreigners, if they were permitted to legislate, or to elect those who should legislate in so considerable a portion of the country!

Indeed, in most instances we find them excluded by the acts of incorporation, in which it is usual to declare that the election of borough officers shall be made by the inhabitants *qualified to elect members of the legislature.* (1)

If we consider the rights of an alien according to the law of nations, and according to the common law, it will be evident that nothing less than an explicit provision in a statute could confer on him the rights of an elector, which seem altogether incompatible with his situation.

An alien is either an *alien friend*, or an *alien enemy*; he may be the one and the other at different periods of his residence, as the country to which he belongs may be at war or in peace with the nation in which he resides.

"The citizen, or the subject of a state who absents himself for a time,

(1) 5 *State Laws* (Carey and B.'s ed.) 42. 54. 75. 169. 203.—6 Vol. 107. 230. 251.—7 Vol. 39. 268.—8 Vol. 36. 40. 51. 106. 147.

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TILGHMAN C. J. The question to be decided is, whether an alien, having resided in *Pittsburg* one year next prece-

"without any intention to abandon the society of which he is a member, does not lose his privilege by his absence; he preserves his rights, and remains bound by the same obligations. Being received in a foreign country, in virtue of the natural society, the communication and commerce which nations are obliged to cultivate with each other, he ought to be considered there as a member of his own society and treated as such. (m) Strangers ought to be subject to the laws." "I mean," says *Vattel*, "the general laws made to maintain good order, and which have no relation to the title of citizen or subject of the state." (n)

By the common law, an alien cannot hold lands; for if he purchase, (upon office found) the king shall have the land. So if the alien die, the freehold and inheritance are thrown upon the king. (o)

He is incapable of leasing lands, pastures, &c. for years. But there is a diversity, as to the leasing of a house for the habitation of a merchant stranger, whose sovereign is in league with the king of *England*. (p)

Neither is an alien capable of holding lands in *Pennsylvania*, except he be an alien friend, who, previously to the purchase of lands, hath declared his intention to become a citizen of the *United States*.

If you clothe an alien with the character of a citizen, you of course subject him to the penalties to which citizens are liable, for refusing to discharge the duties of a citizen. This is no less absurd than unjust, as respects the foreigner, if done without his concurrence. He may have no wish to become a citizen of your country, or to renounce the allegiance which he owes elsewhere, or to abandon a country to which he may be attached by every tie. Will you compel this sojourner to exercise the rights of a citizen, and to perform the duties of one?

As to exercising the right of suffrage, it may be said this is voluntary; and to allow any one to exercise it is a privilege of which he may, or may not avail himself. But when you say he may not only elect, but be elected, you at once subject him to the penalties which may be imposed on persons elected who refuse to serve.

In what situation then, is a foreigner placed? Perhaps no earthly consideration might be sufficient to induce him to expatriate himself; yet because he happens to be found in one of your incorporated towns, you compel him to undertake an office, and in order to qualify himself, to take an oath to support your constitutions, or subject him to heavy penalties for refusing to do so.

Hospitality towards strangers is a trait, as amiable in the character of a community as in that of an individual. It may be consistent with a liberal policy to admit foreigners to the rights of citizenship upon easy terms; but the warmest advocate for affording facility to foreigners in acquiring the rights of citizenship, it is presumed, would not be in favour of compelling men to become citizens; but would at least think it right that the foreigner should declare his willingness to become a citizen, and give some

(m) *Vattel* 269. § 107.(n) *Ib.* 267. § 101.(o) *Co. Litt.* 2 b.(p) *Ib.* 2 b.

ding an election for borough officers, and having paid a borough tax within that time, is entitled to vote at such election.

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pledge of fidelity to the country, before the right should be conferred on him.

The varying of the language, in the act of 5th March 1804, in declaring who shall *elect*, and who may *be elected*, affords the most plausible argument in favour of the plaintiff; and seems to have given rise to the doubts which one of the gentlemen, who was one of the judges of the election, has expressed to the court on the subject.

That act declares that "the *freeholders, housekeepers and other inhabitants*" of the borough of *Pittsburg* who have resided, &c. shall have power to elect by ballot, one reputable *citizen* residing therein, who shall be styled "*the burgess*" of the said borough, and thirteen reputable *citizens* to be a town council, and one reputable *citizen* as high constable; all of whom shall be freeholders in said borough.

It is doubtless a rule of the common law, that in the construction of statutes, every part ought to be taken into consideration, so that no clause, sentence or word, shall be superfluous, void or insignificant. (q)

This rule however, it is conceived, ought to be applied with great caution, to statutes inartificially drawn; otherwise in place of leading us to the real meaning of the statute, or truly explaining the minds of the makers, it will, in all probability, involve us in a labyrinth of confusion and perplexity.

If a statute were drawn by a lawyer, he would, in all probability, seldom vary the expression, without intending to vary the meaning, whatever monotonous appearance might thereby be given to the style; but it would probably be otherwise with men unaccustomed to confine themselves to technical language.

In respect to laws for the incorporation of boroughs, and private acts, far less correctness and perspicuity is to be looked for in them, than in those which concern the state at large.

Whatever weight this variation of language, in the act of March 1804, might be entitled to, if that act stood alone, we shall perceive that it can have none, when all the laws on this subject are, as they ought to be, taken into view.

If in the first act of incorporation, the legislature have used the same words that are found in the act of 5th March 1804, it is presumed that they have the same meaning in both acts.

Now in the first act passed 23d April 1794, it is declared that the "*freeholders, and other inhabitants, housekeepers*" in the said borough, shall have power to elect *two fit persons* to be *burgesses* of the said borough, who shall be freeholders therein; and also to elect four *suitable persons* as *assistants*; and also to elect a high constable and town clerk, who shall be *residents* in the said borough. (r)

It is presumed, if aliens are comprehended in the words of the act of 1804, they are also comprehended in the same words in the act of 1794;

(q) 1 Show. p. 108. Plow. 365. Co. Litt. 381. (r) 3 State Laws 589.

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This will depend on the construction of the several acts of assembly upon that subject.

and of course under that act were eligible to office, as well as qualified to elect others. If qualified to be elected, they may be liable to penalties for refusing to serve; which, as has already been remarked, would be cruel and unjust. But other difficulties occur. Suppose an alien elected to the office of *constable*. As *constable*, the election laws may require his agency in the general elections. It may be his duty to hold an election for inspectors of the general election, at which election for inspectors he sits as a judge; yet as an alien, the same laws forbid his interference at general elections under a penalty of thirty dollars.

Further, if by the act of 1794, this privilege be conferred on aliens residing in *Pittsburg*, it was likewise conferred on aliens residing in *Harrisburg*, by the first act incorporating that borough, passed 13th April 1791, in which the same words, *freeholders* and *inhabitants* are used; who are thereby authorized to elect two able *freemen* of the inhabitants to be *burgesses*, &c. (s)

And if by that act, *aliens* residing in *Harrisburg*, were entitled to the privileges of electing and being elected, the legislature have deprived them of both these privileges, at the session before last; for by an act passed on the 1st February 1808, (8 *State Laws*, p. 20.) the first act of incorporation is repealed; and by this second act, the right of electing as well as being elected, is confined to the freeholders, housekeepers and other inhabitants qualified to vote for members of the general assembly.

It is a remarkable fact, and proves almost to demonstration, the intention of the legislature, in relation to this subject, that since the month of March, in the year 1794, TWENTY-SIX boroughs besides *Pittsburg*, have been incorporated, or have had their charters of incorporation altered; and in the acts which have been passed for these purposes, the legislature have in every instance, without a solitary exception, confined the right of voting for borough officers, to THE INHABITANTS QUALIFIED TO VOTE FOR MEMBERS OF THE LEGISLATURE.

It seems also worthy of remark, that the act to incorporate SOMERSET, was passed on the 5th March 1804, the same day on which the act to incorporate *Pittsburg* was passed, and that by the former act, the right to vote for borough officers, is confined to those of the inhabitants who are qualified to vote for members of the legislature. Is it conceivable that the legislature meant to confer the elective franchise on aliens resident in *Pittsburg*, at the moment they withheld it from aliens resident in *Somerset*?

Is then this intention of the legislature, so frequently, so uniformly, and so plainly indicated, to be thwarted by a variation of expression, which happens to be found in a solitary act?

Is it required by justice or good policy, that aliens of every description (as well those who may intend to become citizens, as those who have no such intention) residing in boroughs, should be privileged to vote for borough officers? I am not prepared to say it is: especially because saying so would be asserting that, at least in twenty-six cases out of twenty-seven,

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Pittsburg was first erected into a borough by an act passed the 22d of *April* 1794, 3 *St. Laws* 588. By the second section of this act, "the *freeholders* and other *inhabitants*, "*housekeepers*" in the borough, were authorized to elect two fit persons to be *burgesses*, who were to be *freeholders*, and also to elect four suitable persons, assistants to the said *burgesses*; and also to elect a high constable and town clerk, who should be *residents* in the borough; provided that no person should be entitled to vote or to be elected, unless he should have been *resident* in the borough, at least one year previous to the election. Citizenship is not made a qualification either of the electors or elected; but in this, as in the other acts, the qualification of the *elected* seems to have been principally regarded; none but a *freeholder* could be elected a *burgess*. As *Pittsburg* increased in population and in consequence, it was found that the affairs of the borough could not be well conducted under the constitution established by the first law. Perhaps too, it was thought somewhat hard, that no one could vote for borough officers, unless he was a *freeholder* or a *housekeeper*. A petition was presented to the legislature for a new act of incorporation, in pursuance of which another act was passed on the 5th *March* 1804, 6 *St. Laws* 199; by which the first act was repealed, and considerable alterations introduced into the new incorporation. By the second section of this act "the *freeholders*, *housekeepers*, and OTHER IN-
" *HABITANTS* of the said borough, who had resided therein "at least one year immediately preceding the election," and *within that time paid a borough tax*, were authorized to elect one reputable *citizen* residing therein, to be styled the

the legislature have in the most unequivocal manner, excluded these people from a privilege which justice and sound policy required they should enjoy. On the contrary, I believe that the exclusion of them is perfectly consistent with justice and good policy; and that the legislature have uniformly intended to exclude them.

Upon the whole it is conceived, that by a fair construction of the act of 5th *March* 1804, aliens are not entitled to vote at borough elections in *Pittsburg*; and if any doubts could arise on the construction of that act alone, of which however I entertain none, that the act of 7th *March* 1805, and others on the same subject, ought to be taken into view with it, as forming one system, and construed consistently.

The Court are of opinion, that judgment be rendered for the DE-
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burgess, and thirteen reputable *citizens* to be a town council; also one reputable *citizen* as high constable, all of whom should be *freeholders* in the said borough; but previous to the election, the *inhabitants* were to elect three reputable *citizens* as judges, one as inspector, and two as clerks of the said election. The same superior attention to the qualification of the *elected* is here shewn, which was observable in the first law. They were all to be *freeholders* and *citizens*, but not so the *electors*.

It is not contended that by the *words* of this law, there is any disqualification of aliens as voters; but it is said that the law is to be construed by *equity*; that by its literal expressions *women* and *infants* might vote, and that by the principles of the common law, it is as proper to exclude an *alien*, as a woman or an infant. If there had been no reason to suppose that the case of aliens had been under the consideration of the legislature, and if it did not sufficiently appear by the words of the law, that it was *not intended* to exclude them, it would be necessary to consider the weight of this argument, derived from the principles of the *English common law*. But as the case is, I shall only say, that the argument is not so forcible here, as it would be in *England*, because *Pennsylvania*, both under the proprietary government, and since her independence, has held out encouragement to aliens, unknown to the principles of the common law. I found my opinion solely on the expressions of the act of assembly. When I find the qualifications of the electors and elected, different; when I see that none but *citizens* can be elected, but that *inhabitants* who have resided one year, and paid a borough tax within that time, may be permitted to vote, I am irresistibly led to the conclusion, that in the view of the legislature, the peace and prosperity of the borough were sufficiently secured, by providing that the officers elected should be citizens, although aliens of a certain description, who from length of residence, and payment of taxes, might be supposed to have a common interest with the other inhabitants, were indulged with the right of voting.

Thus the matter stands on the act of 5th *March* 1804. But another act, passed the 7th *March* 1805, 7 *St. Laws* 103, has been introduced by the counsel for the defendants, as throwing light upon the question. By this act,

all inhabitants of *Pittsburg* "who shall have resided within the same, six months immediately preceding the election, and who shall in other respects be entitled to vote for members of the general assembly," shall be entitled to vote at the election of officers. There is nothing in this act which repeals any part of the former act, or in any manner impairs the right of voting previously vested in any person whatever. It is an affirmative statute, extending the elective franchise to persons not embraced by the act of 5th March 1804; by that act none could vote who had not paid a borough tax within a year previous to the election. It is stated in the case before us, that in April 1804 an ordinance of the borough was passed, by which it was provided that all taxes should be levied and assessed on *real property only*. The consequence was that many persons were excluded from voting, who would have been willing to pay taxes, and who were qualified to vote for members of the legislature. These persons would naturally be discontented, and it is reasonable to suppose, that to afford relief to them, and not to take away the right of voting from any description of men who enjoyed it under the former law, was the act of 7th March 1805 enacted. My opinion therefore is that the judgment of the Court of Common Pleas be reversed.

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YEATES J. The simple question in this case is, whether a *freeman* of full age, either a freeholder or inhabitant of the borough of *Pittsburg*, who has resided therein one year next before the election, and within that time has paid a borough tax, but who is not a citizen of this commonwealth, is entitled to the elective franchise at an election of borough officers, within the borough.

The solution of this question rests on the true construction of the different acts of assembly respecting the borough of *Pittsburg*. We must collect the meaning of the legislature from their own words; and the *tout ensemble* of all the laws enacted by them *in pari materia*, must be taken into consideration. The preëxisting defect or mischief, and the remedy prescribed, form capital objects of inquiry.

The first act, to erect the town of *Pittsburg* in the county of *Allegheny* into a borough, was passed on the 22d April 1794, but the same was wholly repealed by the 15th section

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of the act of 5th *March* 1804. The second section of this act runs as follows: "The freeholders, housekeepers and other inhabitants of said borough, who have resided within the same at least one year immediately preceding the election, and within that time paid a borough tax, shall have power on the third *Saturday* in *March* next, and on the same day in every year hereafter, to meet at the courthouse in said borough, and then and there between the hours of 12 and 6 o'clock of the same day, elect by ballot one reputable citizen residing therein, who shall be styled the burgess of said borough, and thirteen reputable citizens to be a town council, and shall also elect as aforesaid one reputable citizen as high constable, all of whom shall be freeholders in said borough &c."

The act "for the further regulation of the borough of *Pittsburg*," passed 7th of *March* 1805, is an affirmative statute, and provides "that the inhabitants of the borough, who in other respects shall be entitled to vote for members of the general assembly, and who shall have resided within the same six months immediately preceding the election, shall be fully competent to vote at the elections of officers for said borough." It gives a privilege of voting, to inhabitants who have resided six months in the borough, provided they are entitled to vote for members of general assembly; but it takes away no privilege conferred by the former act of 5th *March* 1804. It is therefore obvious that the case before the court must be determined by the provisions of the law of 1804.

I fully agree, that in the construction of all statutes, it is the indispensable duty of courts of justice, to carry into execution the true intention of the lawgivers, and that in some instances, to attain this end, the words of the law have been enlarged, and in other instances, restricted. 4 *Bac.* 649. *Statute* I. 6. *Plowden* 465. In the case of a last will we are bound to search for the intent of the individual, and in a law expressive of the public will, it is incumbent on us to search for its true meaning. Where the words are clear, plain, and unambiguous, and all doubts and suspense concerning its intention are removed, we have no right to meddle with the policy of its regulations, but must conform to the provisions of the legislature. *Ita lex scripta est.*

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The second section of the act of 5th March 1804 exhibits two distinct prominent features, in prescribing the qualifications of the *electors* and *elected*. A power to vote for borough officers, is expressly given to *freeholder's, housekeepers, and other inhabitants* of the borough, who have resided therein one year next before the election, and within that time have paid a borough tax: but the burgess, thirteen town councilmen, and high constable to be elected, must not only be resident freeholders in the borough, but they must possess the superadded qualification of *citizenship*. The judges, inspector, and clerks, to be previously elected, must also be *citizens*. The two classes of electors and elected are plainly contradistinguished in this particular; and we cannot suppose, that if the character of *citizen* was deemed an essential requisite in the borough *elector*, the insertion thereof was omitted through oversight.

I freely admit that the general words conferring the privilege of suffrage, must have a reasonable construction; and that in forming the same, we can have no safer guides than the rules of the common law, as received in this state. I think therefore that females, minors, servants for years, and slaves, are not included by the generality of expression. I go further, and am strongly disposed to think, that upon principles of fair and correct construction, if these words of marked discrimination between the electors and elected had not been used by the legislature, that aliens would not have been entitled to vote at borough elections in this place.

It may be objected that we ought not to compel a sojourner to exercise the rights of a *citizen*, and perform the duties of one; and that an alien may thereby be subjected to penalties imposed on persons refusing to act as, or vote for, borough officers. But this admits of a ready answer. The alien, who is otherwise qualified, may or may not vote at the election of borough officers, at his own will and pleasure. There is no compulsion on him to exercise that privilege, and no penalties are incurred by omitting to use it. But an alien, under the terms of the law is ineligible to a borough office, and therefore no penalties can be attached to the non-performance of duties, which the law has declared him incapable of sustaining.

Upon the whole matter, I am constrained to say, that the
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BRACKENRIDGE J. The being an inhabitant, and the paying tax, are circumstances which give an interest in the borough. The being an inhabitant, gives an interest in the police or regulations of the borough generally; the paying tax gives an interest in the appropriation of the money levied. A right, therefore, to a voice mediately or immediately in these matters, is founded in natural justice. To reject this voice, or even to restrain it unnecessarily, would be wrong. It would be as unjust as it would be impolitic. It is the wise policy of every community to collect support from all on whom it may be reasonable to impose it: and it is but reasonable that all on whom it is imposed should have a voice to some extent in the mode and object of the application. Reasons of policy may warrant the restraining the eligibility to office, but it must be a strong case of the *salus populi* indeed, that will warrant the restraining, much less excluding, the right of electing to office.

The act of incorporation before us, of the 5th of *March* 1804, restrains the right of electing to the being an inhabitant of the borough, and having resided within the same at least one year immediately preceding the election, and within that time paid a borough tax. Could the legislature have restrained farther without departing from a general principle of almost every corporate body? Even in the monarchical republic of *Britain*, every individual of that community is supposed to be represented, *virtually*, as they call it, and to have a voice. I do not believe that a legislature of *Pennsylvania*, would incorporate with a farther restraint of privilege, unless by oversight. I believe they have not done it. I have not examined at this time; but so far as my memory serves me, there is no incorporation of a borough, in which the being an inhabitant for a reasonable time, and the paying a borough tax, does not entitle to a voice for borough officers. Unless the legislature in this case *ipse intuitu*, looking at the thing, directly had restrained the qualification in express words, I would not say that it had done it. But has it done it by implication even? If by implication, I would require at least that it should be a necessary

implication, which nothing could resist, being contrary to all that is usual in other cases, of a like nature, and contrary to every principle of wise economy.

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Does the act of the 7th *March* 1805, as is contended, restrain the privilege? It provides that the *inhabitants* of the borough, who shall have resided within the same six months immediately preceding the election, and who shall in other respects be entitled to vote for members of the general assembly, shall be fully competent to vote at the elections for officers of said borough. This so far from restraining the privilege of voting in the case of inhabitants for twelve months, who have paid a borough tax, enlarges the privilege in the case of a *citizen inhabitant* to a residence of six months, even though a tax had not been paid. Shall this courtesy, if I may so express it, this comity of the act of 1805, by implication work an abrogation in its most reasonable and salutary privilege? The construction is repugnant to every principle in the construction of statutes. The intention is manifest. The two acts are consistent and stand together: the last carrying the privilege of voting farther in the case of a *citizen*, than the former had in the case of *inhabitants* generally. As to reasons drawn from *state necessity*, to exclude all but naturalized citizens and those who have a right to vote for members of assembly, from voting at a borough election, they are observations which might be addressed to the legislature, in order to produce a modification of the borough laws throughout the state; but I take it we are not yet come to that narrowness of thinking or mistaken policy, that they would receive much attention.

The borough ordinance made after the act of 1804, that borough taxes should be levied upon real estate only, thereby excluding inhabitants not freeholders, was unjust as well as *impolitic*. It was *unjust*, because it excluded inhabitants who have an interest in the police of the borough, independent of the appropriation of money. It was *impolitic*, because it excluded the aid of contribution by those not freeholders, and increased the tax on real estate, or hindered the accumulation of funds to be applied to the improvement of the town. In remedy of this exclusion, and indirectly to avoid it, and secure a more liberal policy, the act of 1805 seems to have been made, and was salutary; nay it was necessary, in

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order to protect the personal rights of individuals, as well as to secure the owners of real estate from the burdens of tax on real estate greater than they would otherwise be. I understand the ordinance has been repealed, but I notice it only as accounting for the law of 1805, which is the law in question.

I am therefore of opinion that the judgment of the Court of Common Pleas be reversed, and that judgment be entered for the plaintiffs in error.

Judgment reversed.

Cosby against The Lessee of BROWN.

IN ERROR.

*Pittsburg,
Wednesday,
September 13.*

When an actual settler who has made some improvements, has been deterred by the violence of a younger settler from completing his settlement, and has for several years neglected to take steps for the recovery of his possession, it is a fact for the jury to decide whether he has not relinquished his settlement. He does not stand in the situation of a person having a legal title, who may bring ejectment at any time within 21 years.

An actual settler cannot support an ejectment without a survey.

UPON error to the Common Pleas of *Butler* county, the case was thus:

The lessor of the plaintiff below, claimed the premises in the ejectment as an actual settler. He commenced his settlement in the year 1797, erected a small house, cleared a piece of land, sowed an acre and a half of rye, fenced the ground, and went away in the autumn, with an intention to return in the ensuing spring and complete his settlement. In the spring of 1798 he did return; but one *James Cosby*, under whom the defendant entered, had in the mean time taken possession of the cabin, and by the menace of violence prevented *Brown* from continuing his improvement. *Brown* left the land, saying that he would not contend with force, but would resort to the law; he however returned to *Mifflin* county, his former place of residence, and until the 15th *March* 1805, when the present action was commenced, he took no measures to recover his possession. The *Cosbys* remained constantly on the land from 1798, and made several improvements.

In order to prove a survey of the premises, the plaintiff gave in evidence a paper signed by the deputy surveyor of *Butler* county, purporting to be a survey of a 400 acre tract, the field notes of which were in the following terms. "*Feb-*

"ruary 22d and 23d 1805. Surveyed by the direction of
 "James Buchanan on the tract that William Cosby lives on
 "now, beginning at a post, thence by Ebenezer Beaty 212
 "perches, and to complete the said survey the long way of
 "the tract is to be east and west at the option of Thomas
 "Brown who claims the same." No other line was run,
 no other courses, distances or corners marked, nor were
 there any old lines by which the plaintiff's claim could be de-
 signated; but after the assistant deputy surveyor had run the
 212 perches by Beaty's land, he then ran west about one out.

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The Court of Common Pleas gave in charge to the jury,
 that "the paper given in evidence by the plaintiff as a survey,
 "was a legal survey, and an official designation of the plain-
 "tiff's claim; and that if Thomas Brown had the first actual
 "settlement, and was prevented by James Cosby from going
 "on to complete in the spring of 1798, what he had begun
 "towards the making of a settlement in 1797, his claim being
 "found by the jury to have been made with a bona fide inten-
 "tion to make an actual settlement in pursuance of what he
 "had done in 1797, he ought to recover." To this charge
 the defendant's counsel excepted, and the court put their
 seals to a bill of exceptions.

Baldwin for the plaintiff in error. 1. The plaintiff had no
 legal survey, without which a settler cannot support an eject-
 ment. The alleged survey in February 1805 was incomplete,
 although there was no obstacle to its completion. Only one
 entire line, and a small part of another were run; and there were
 no old lines of surrounding tracts, or lines previously run by
 public authority, which could be adopted by the plaintiff, to
 define the limits of his claim. If such a survey is valid, a
 single line with a memorandum that the greatest length of
 the tract is to be in a certain direction, must in all cases
 suffice. 2. The plaintiff did not continue his settlement. He
 made no effort to regain possession from 1798 to 1805.
 Now it is certain that a settlement may be both relinquished
 and forfeited. It may be given up intentionally, with a view
 to another enterprize, or it may be lost by not pursuing the
 directions of the law. An inceptive title by improvement is
 not a legal title, and therefore is not subject to the rules of a
 legal title; there must be a continuance of settlement for five

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years, or the want of it accounted for. If the settler, though driven from his improvement, remains absent from it a long time, it is a question of fact whether he has not abandoned it altogether; and this fact should have been left to the jury. The charge was therefore erroneous, because it decided that if the plaintiff was once prevented by the defendant, he was entitled at all events to recover.

A. W. Foster for the defendant in error. 1. Whether all the boundaries were accurately fixed by the survey, is immaterial; the survey was sufficient to give title. It was made by the public officer whom the plaintiff could not control, and whose acts should therefore be construed favourably for him. It was as complete as many surveys which have received a judicial sanction. In *Hazard's Lessee v. Lowry* in the state court, only two corners were marked, and so in *Heidekoper's Lessee v. Burroughs* in the Circuit Court of the United States. Here one line was run, and two courses; and to overthrow such a survey, will involve the state in confusion. 2. It has been decided that an entry on the land by an adverse party, is a prevention within the act of 1792. (a) Prevention is an excuse for not prosecuting the settlement; and therefore in point of law the court below was right, because while the prevention lasted, it continued to be an excuse; and it lasted to the commencement of the action. If the plaintiff had not been prevented by force, there might be some ground for considering him as relinquishing the settlement; but the application or threat of violence in order to keep him off, is evidence of his resolution to persevere; and when he did leave the land, he left it with a declaration of the course he afterwards pursued. If a settler is removed by force, it should never lie in the mouth of the intruder to say that the settlement was relinquished. In such a case the settler has complied with the law, as far as was in his power; he has obtained a title to the land, and stands upon the footing of a common proprietor, who may bring his ejectment at any time within twenty-one years after his dispossession.

TILGHMAN C. J. after stating the case, delivered the opinion of the court.

(a) 1 Binn. 231.

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There is no doubt but the plaintiff commenced a settlement in 1797, and returned to it in the spring of 1798 with a view of completing it. His right was *prior* to the defendant's; and if he had commenced an action soon after being prevented by the defendant, he must have recovered against him. But although he might have recovered if he had brought suit in a reasonable time, it does not follow that he may recover after a lapse of seven years. The law with respect to actual settlers was laid down by this court explicitly in the case of *Porter and Wright*, plaintiffs in error, against the Lessee of *Small*, defendant in error. If the settlement once commenced, is not continued without interruption, it lies upon the settler to account for it by some reasonable cause. A liberal allowance is made for a man who has evinced a *bona fide* intention to settle. Danger from an enemy, the death or sickness of the party or his family, the difficulty of procuring provisions, and a variety of other circumstances, are to be taken into consideration. But it must always be remembered, that the title is *imperfect*, till completed by improvement and residence of five years, and that though fairly and legally begun, it may at any time be relinquished. It is no uncommon thing for differences and even force to take place between settlers on the same tract; but although the prior settler may be in the first instance ill used, and driven off by force, he may not always chuse to pursue his settlement. As long as he is prevented by the apprehension of violence, he stands excused from prosecuting his improvement. And even if he brings no suit, it is possible that he may fairly account for it. But I cannot assent to the broad proposition contended for by the counsel for the plaintiff, that a man who is once prevented by violence, may retire from the land, and recover in an ejectment at any time within twenty one years. Such unreasonable delay may take place as would justify the younger settler, who had made use of force, in thinking that his adversary had relinquished all idea of settlement; and in that case, the law will not suffer the labours and expenses of years to be swept away. The title of a settler under our act of assembly is of a special nature. Until completed by improvement and residence, it is not to be compared to the case of a person possessed of a perfect legal estate, whose right of entry

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is not barred by less than twenty-one years of adverse possession. We have been accustomed to leave it to the jury to decide, under the circumstances of each particular case, whether the settler has followed up the commencement of his settlement with reasonable diligence. In the case before us, the court below took it for granted that the plaintiff was at all events entitled to recover, if he was hindered by the defendant from prosecuting his settlement, in the year 1798. In this I think they erred; for it should have been left to the jury to decide, whether under the facts given in evidence, the plaintiff might not fairly be presumed to have relinquished his settlement.

Another point has been made respecting the plaintiff's survey. The defendant contends that no legal survey was made, and that without it, the plaintiff cannot recover. It has been determined in the Circuit Court that a settler cannot support an ejectment without a survey. But the facts respecting this survey are not so fully stated on the record as I could wish, to form a decided opinion. I confess that I shall always feel strongly disposed to support the case of a settler who has requested the officer appointed by the government to make his survey, and given him the necessary instructions, especially where the officer enters a survey in his book as having been actually made, and it is not pretended that a third person has been injured by making improvements which he would not have made, if he had known of an adverse claim. But upon this point I give no opinion.

Upon the whole my opinion is, that there is error in the charge of the Court of Common Pleas, and that therefore the judgment of that court should be reversed, a writ of restitution issue, and a *venire de novo* be awarded.

Judgment reversed.

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*Pittsburg,
Friday,
September 15.*

CAMPBELL *against* SPENCER.

THIS was an appeal from the decision of Mr. Justice Yeates at the *Somerset* Circuit Court in *October* last.

It was on action of ejectment, in the form prescribed by the late act of assembly, on the trial of which, the following circumstances appeared in evidence.

The plaintiff and two other persons his intimate friends, sent for the defendant to meet them at a tavern. He came early in the morning, and a pint of bitters having been drunk among them, a barter was proposed between the plaintiff and defendant for the farm of the latter, the premises in the ejectment, a body of about 450 acres, situated near to the new turnpike from fort *Cumberland*, to be paid for by a quantity of store goods belonging to the plaintiff. There was some negotiation as to the terms, but the parties finally arranged the bargain by an article of agreement, by which the defendant sold to the plaintiff the farm in question for 3000 dollars, a part of which not exceeding 500 dollars was to be paid in money, to be applied to the discharge of certain debts and costs of suit due from the defendant to other persons, and the residue was to be paid in store goods, the price of which was to be fixed by two merchants, if the parties could not agree. The defendant was a farmer unacquainted with merchandize, and had a wife and a large family of children with whom he resided on the farm. The plaintiff was a store-keeper. Immediately after the bargain, the defendant wished to annul it, but he was told it would be child's play, and that the plaintiff did not make a child's bargain, but would stick to the article. The succeeding night he was much distressed, and said he had ruined his family; and on the following morning he applied to the plaintiff to let him off, who refused. For some days afterwards he was undecided as to his course, but he finally told the plaintiff that he was determined not to adhere to the bargain; and before the bringing of the action, he offered to submit to arbitration the damages to be paid for the breach of contract. The plaintiff, after the contract, paid a small sum of money on account of the defen-

The plaintiff brought his ejectment upon an equitable title, which although perhaps not unfairly obtained from the defendant, was accompanied by some suspicious circumstances, and at all events was very indiscreetly bartered away by the defendant. The jury, although instructed that the contract was lawful, found a verdict for the defendant, which the court refused to set aside.

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dant's debts; but whether the payment was made before or after the defendant had refused performance, was not very clear. Some evidence was offered to shew that the defendant had been sent for to the tavern by the plaintiff, and that in the course of the business he told the defendant that nothing but the sale could save his land from execution; but a witness swore that one of the other persons sent for him with a view to purchase some of his cattle. There was testimony also as to the value of the land, which the defendant's witnesses thought was worth 3750 dollars, and the plaintiff's about 2700 dollars.

His Honour Judge *Teates* told the jury that there was nothing in the evidence which would authorise the court to say that the contract was void, however indiscreet it might have been on the part of the defendant; but the evidence was for their consideration. The jury however found a verdict for the defendant, which upon a motion for a new trial was set aside, and it was from this decision that the defendant appealed.

Woods for the defendant argued, that this was not a case in which the court should interfere with the verdict. The jury had found for the defendant; on what ground could not be precisely ascertained; but it should be presumed to have been upon such a ground as they were entitled to take. Even if they thought the contract altogether void, the case was of such a character as to justify them in that opinion. The facts taken together shewed that the defendant was not in a situation to give that free assent which is essential to the validity of a contract; and that he was circumvented and entrapt into the bargain. To send for a farmer to a tavern, and there amidst drinking to persuade him into a barter of the farm upon which his family were maintained, for a store of goods of the value and management of which he was wholly ignorant, at first blush excites a suspicion of design. The suspicion is strengthened by the evidence that the bargain was suggested as the only means of avoiding execution, and also by the instant repentance of the defendant. However the court might say before the cause had gone to the jury, that there was nothing, upon which they could declare the contract void, yet the complexion of the

case is very much altered by the verdict. The jury had the whole evidence before them, and might believe those parts exclusively which went to shew circumvention, ignorance, or surprize. Ignorance and error either in fact or law are impediments of assent. 1 *Fonbl.* 106. An agreement founded upon mistake, or produced by circumvention and fraud, or by false suggestions, is invalid; 1 *Fonbl.* 111. 113; and surely the nature and circumstances of the bargain, warranted the jury in the opinion that there was both ignorance and surprize on the part of defendant, and circumvention and false suggestions by the plaintiff. But whether the contract be void or not, at all events it is a case in which the court should be neutral. It is in the first place a verdict for the defendant in ejectment, in which the court very rarely grant a new trial. *Lessee of Glymer v. Littler* (a). It is a hard case upon the defendant, and in such cases new trials are not granted. *Reaveley v. Mainwaring* (b). It is a case in which substantial justice, if it is not already done, may be obtained in another way, as in an action for breach of the contract; and this is a further objection to a new trial. *Goodtitle v. Bailey* (c). That the verdict was against the judge's opinion, is not a sufficient reason for granting a new trial; 1 *Wile.* 22; particularly where the plaintiff has received no substantial injury. *Burton v. Thompson* (d). And in this case, the injury, if he received any, was the consequence of his own perverseness in paying money after he knew the defendant's intention. It is finally a case in which the plaintiff has not this kind of remedy by the common law; he comes to the equity powers of this court to obtain in effect a specific performance; and such powers were never exercised upon such an occasion.

S. Riddle for the plaintiff contended, that however doubtful might be the precise ground upon which the jury proceeded, it was most probable that they thought the contract was void, for upon hardly any other ground could they have found a verdict for the defendant; but they were equally wrong if they were of opinion that the defendant had a right to renounce the contract paying damages. There cannot be

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(a) 1 *W. Bl.* 348. (b) 3 *Burr.* 1306. (c) *Comp.* 601. (d) 2 *Burr.* 664.

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any reasonable suggestion of fraud, falsehood, or ignorance in the case. The defendant was not intoxicated. He was not sent for by the plaintiff with a view to the barter, but by the others to purchase his cattle; and he made the bargain, however indiscreetly, at least with adequate deliberation. To invalidate such a contract by such evidence, is to introduce a new rule in equity, that no bargain shall be specifically executed, which gives a greater benefit to one than to the other party. The defendant may not have known the value of merchandize; but this was immaterial, as the price was to be settled by reference. The price at which his farm was taken was high; at least it was a fair price, as it was considerably higher than the estimate of the plaintiff's witnesses. In what way then does circumvention shew itself. The defendant repented; and thousands of valid contracts produce repentance. There was no time for consideration asked, and there was no surprize which made consideration necessary. The most that can be said is that the contract was not made with as much discretion as it ought to be; but this is no ground for setting it aside. 1 *Fonbl.* 114. "It is not sufficient to set aside an agreement in equity, to suggest weakness and indiscretion in one of the parties who has engaged in it; for supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him upon this footing only, unless he can shew fraud in the party contracting with him, or some undue means made use of to draw him into such an agreement." *Willis v. Fernegan* (a). The plaintiff does not ask any thing of the court, which it is at liberty to deny him. He is entitled to maintain his ejectment upon an equitable title, as well as upon a legal one. All he asks is the just effect of his contract, not a special interposition of the court; for it can never be called a special interposition, when the court are asked to set aside a verdict against law and evidence. The refusal turns the plaintiff to a new action, great delay, and additional costs; whereas a new trial does not change possession, nor in any manner weaken the defendant's case.

(a) 1 *Atk.* 251.

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TILGEMAN C. J. The plaintiff in this case, stands in the situation of a person applying to a court of equity, for a decree to compel the specific performance of a contract for the purchase of two tracts of land from the defendant. I agree with Judge *Yeates*, before whom the cause was tried, that there is nothing in the evidence reported by him, which would authorize the court to say that the contract was void. The plaintiff might undoubtedly support an action for damages for breach of the agreement. But a contract may be binding at law, and yet a court of equity may not think it reasonable to decree a specific performance. If this case had been brought before me as a chancellor, I should have felt considerable difficulty in forming a decision. [Here the Chief Justice gave the preceding statement of the facts, and then proceeded as follows.] I have said that as a chancellor, I should feel difficulty on this subject; because although I cannot say the defendant was drunk, or that there is express evidence of an unfair advantage being taken of him, or that the price was very inadequate, yet there are circumstances in this transaction, which I do not like. I do not like the sending for a man to a tavern, and bargaining for the land which supported his family, amidst the drinking of bitters early in the morning; and I do not like a contract by which a *farmer* is involved in the folly of buying a store of goods. If it appeared that the plaintiff had been put to expense or damage, in pursuance of the contract, before the defendant had expressed his resolution to be off, the case would have been much stronger; but quick repentance followed the rash engagement, and of this the plaintiff was informed. I will not say, nor have I made up my mind, how a chancellor ought to decree, under all these circumstances. But that is not precisely the point before us. The jury found for the defendant, which strengthens his case very much. I am now to consider whether that verdict is so clearly wrong, that a new trial should be granted. I do not know on what ground the jury formed their opinion. It is said by the plaintiff's counsel that they undertook to pronounce the contract as altogether void. If that was ascertained on the record, and the case could be reduced to that point, I should have no hesitation in saying that there should be a new trial. But this is impossible. We cannot say on what point the verdict

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was founded. Suppose now the jury were of opinion, that the contract was so far binding, as to make the defendant answerable in an action for *damages*, but that it was not a case, in which the plaintiff was entitled to a specific performance. I then ask myself, whether I am *clear*, that on this ground the jury were wrong. I have thought a good deal of it, and I cannot say that I am. It is one of those cases in which I would not interfere with the verdict, whether it was for plaintiff or defendant. The result of my reflections is an opinion that the verdict should stand; and I am the more inclined to this, as the plaintiff is not concluded by this judgment, but may try the matter once more in a new ejectment.

BRACKENRIDGE J. I cannot dissent from the law as laid down by the Judge who held the Circuit Court upon the trial of this cause, and my understanding of the law would have been given to the same effect in a charge to the jury. But I incline to think my impressions would have been more favourable to the defendant on the equity of the particular case. Be this as it may, I should not have thought myself warranted in setting aside a verdict found by the jury in favour of the defendant. It is impossible on an appeal to have the case so clearly and completely before one, even from the most correct and the fullest notes, as it appeared on the trial; and therefore it ought to be with much hesitation that we depart from what the Judge has thought reasonable in the exercise of his discretion. But it would seem to me that the granting a new trial in this case was not sufficiently distinguished in the mind of the judge, from the granting a new trial where principles of law only were in question. The question in this case resolved itself in a great measure into a question of fact, the fairness, the open dealing, the honesty, of the transaction. When the heart revolts at the inequality of a contract, taking into view the parties, the occasion, and all considerations, there cannot be said to be *equity*. The inequity may be felt where it cannot so well be pointed out. The advantages were all on the side of the plaintiff in this case, on the score of opportunity of information, from his residence, and his occupation as a trading person. I am impressed with the idea of some management to bring about the bargain. It is evident that the plaintiff thought

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he had got an advantage, from his unwillingness to allow the least time as a *locus penitentiae* to the unfortunate vendor. He stuck to his article, he made no child's bargain &c. It was the defendant's place of residence. On quitting possession of an earthly spot where we have lived, who is there who does not cast a "longing lingering look behind." The "*advena possessor agelli*" cannot but affect the mind. Some indulgence to the *resipiscence* of the heart ought to be allowed. Had I been a chancellor, and the case before me as I have it in my mind, I should have hesitated to decree an execution of the contract, but rather have left the plaintiff to his article and to damages.

It is not a case where an individual, on the faith of the contract, has made sale of property in order to raise money, or to change residence. In a case where the conduct of the party was clear of all imputation or suspicion of undue advantage taken, or where he has suffered injury by the causeless and wanton dereliction of an agreement by the party making it, I would be willing to have it carried into effect; and there might be a case, where contrary to the sense of the jury, I might so far insist upon it, as to give the chance of another trial. But I take it, as has been already hinted, that after a verdict, the case is not before the judge, as it was on his delivering his charge. He has the sense of the country against him, which country the jury are, and the sense of the country in a matter of equity. This consists in exceptions to general principles. A sense of right and wrong in the common mind goes a great way to assist the deductions of the understanding. The application of the principle must be wrong, where the feelings of humanity cannot be reconciled to it. In ascertaining the truth of facts, and in weighing the equity arising from them, the law as it is in *Pennsylvania* by the intervention of a jury in an equity case, has the advantage greatly over a decision by a chancellor; and the people are tenacious of it. I admit the filing the petition or bill upon oath, and the answer upon oath by the defendant, are in some cases advantages which we have not; and it has been thought by some advisable to have this given by an act of the legislature; but a jury trial has the advantage of *viva voce* testimony, which is of incalculable moment in the elicitation of truth, and the forming an estimate of the perception, the

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memory, and the grounds of belief in a witness. The ascertaining the equity of a case depends with us upon two tribunals, that of the court and the jury, constituting one forum. Often there are cases where the jury may be considered the most competent; the case before me I think one; and therefore on the trial I should have left it at least as much to them, as the judge did. Under the impressions I now have, I would not have granted a new trial. Had the verdict been for the plaintiff, I should have been more inclined to set that aside, though I would not have done it; but I certainly cannot reconcile it to myself to sanction the setting aside a verdict for the defendant. I think therefore the appeal from the judgment of the Circuit Court ought to be sustained, and that judgment for the defendant ought to be entered.

The above are the ideas which I noted down upon the argument, before I had any intimation from the Chief Justice of the inclination of his mind upon the subject, and at the same time without having it in my power to examine the authorities cited, or to consult others which might be found. But I find myself irresistibly impressed with the idea of circumvention on the part of the plaintiff; and I also take it into view, that the consideration, if I mistake not, was not altogether money, but goods out of the plaintiff's store, the price of the parcels to be fixed; so that the contract does not sound in such certainty, if I may so express it, as to require no arrangement in order to come at the consideration, reduced to money, which was to be paid. As I reflect more upon it, my repugnance grows the stronger to the idea of enforcing the agreement. So far from it, that I take it the damages would be but slight, that a jury would be disposed to give. The plaintiff had in his mind the calculations of the rise of property from a turnpike, which the defendant does not seem to have thought of; and of getting off the remnant of a store, which is not equal to cash even at the invoice prices. I think the bargain therefore hard, and accompanied with such circumstances, as will justify a court in refusing to lend their aid to the carrying it into effect.

Decision reversed and
Judgment for defendant.

END OF SEPTEMBER TERM.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Eastern District, December Term, 1809.

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MILNE against DAVIS.

*Philadelphia,
Monday,
December 11.*

M'KEAN for the defendant obtained a rule upon the sheriff, to shew cause why he should not return the poundage charged and received by him in this case.

The sheriff is not entitled to poundage upon a *ca. sa.* unless he receives and pays the money.

A *ca. sa.* for 2643 dollars, 16 cents, and interest, was issued against the defendant to *September* term 1802, to which the sheriff returned "*cepi corpus*, and discharged by plaintiff on payment of costs, which are paid as per order filed." In these costs was included the sum of 15*l.* 14*s.* 10*d.* poundage upon the amount in the execution, no part of which had been received by the sheriff.

M'Kean said there could be no question that the charge of poundage was illegal, because the fee bill allowed it upon a *ca. sa.* only "*for receiving and paying*" the money. 3 *St. Laws* 782. made perpetual 15th *March* 1800, 4 *St. Laws* 598. In this case the sheriff received nothing under the execution, the defendant having been discharged by the plaintiff.

TILGHMAN C. J. What are his fees for executing a *ca. sa.*? It is a great hardship upon the sheriff to be liable for an escape, and yet to receive nothing.

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M'Kean. There does not appear to be any fee for executing a *ca: sa:* but I conceive that the fee bill is the only rule.

PER CURIAM. The act of assembly, in giving poundage upon a *ca: sa:* confines it to cases where the money has been paid and received. It may be hard upon the sheriff, but we cannot give what the act refuses. Let the rule be made absolute.

Rule absolute.

Philadelphia,
Thursday,
December 14.

WILLIAM PHILLIPS administrator of **JOHN PHILLIPS** against **BONSALL** who survived **CLARKSON**.

A covenant by two tenants in common to pay the rent reserved by the landlord, is a joint covenant notwithstanding their several interest in the land.

There must be an union of the land and the rent in the same person, to work an extinguishment of the rent. A vested right to enter and hold the land until payment of the rent, is not sufficient.

THIS cause came before the court upon a case, which stated in substance as follows:

Joseph Morris and wife on the third of *August 1774* conveyed a lot of ground in the county of *Philadelphia* to *Matthew Clarkson* and *Edward Bonsall* in fee as tenants in common and not as joint tenants, reserving a rent charge of forty dollars per annum which the grantees covenanted to pay in the following terms: "and the said *Matthew Clarkson* and *Edward Bonsall* "for themselves, their heirs, executors, administrators and assigns, do covenant, promise and grant to and with the said " *Joseph Morris* his heirs and assigns by these presents, that "they the said *Matthew Clarkson* and *Edward Bonsall* their "heirs and assigns, shall and will well and truly pay or cause "to be paid unto the said *Joseph Morris* his heirs or assigns the aforesaid yearly rent of forty *Spanish* milled "pieces of eight &c. on the first day of *June* yearly forever, "according to the true intent and meaning of these presents." This rent charge was conveyed on the 21st *October 1776*, by *Morris* and wife to *Thomas White*, who died seized thereof on the 29th *September 1779*; and under his will, and certain assurances from his devisees, it vested in *William White* and *Mary Morris*, who by indenture on the 18th of *December 1795* assigned it, with all rights of entry &c. to *John Phillips* in fee.

2 B 138
206 196

2b 138
393C 644

Matthew Clarkson and wife and *Edward Bonsall* and wife by indenture dated 20th *September 1775*, granted the same lot to a certain *Morgan Bustead* in fee, subject to the aforesaid rent charge of forty dollars, and reserving a new rent of forty dollars per annum payable to themselves in fee, together with a right to enter and distrain for the same, and for want of sufficient distress to hold "repossess and enjoy the premises until the rent and arrearages and all charges should be fully paid and satisfied;" and on the 26th *June 1779*, a right of entry having accrued for rent in arrear, *Clarkson* and *Bonsall* assigned the new rent charge, together with all arrearages due thereon, and their right of entry &c. to the aforesaid *William White* in fee. *William White* remained seized of the new rent charge until the 8th of *December 1795*, when he conveyed the same and all arrearages to the aforesaid *John Phillips* in fee.

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No improvements were erected upon the said lot at the time of the grant by *Morris* in the year 1774, nor were any subsequently erected; but the lot and the possession thereof remained vacant from the 25th day of *June 1779*, no entry having ever been made to hold for satisfaction of the rent.

Clarkson died before the commencement of this suit, having left a will and therein appointed executors.

The present action of covenant was brought to recover damages for non-payment of the original or first rent charge; and the questions for the court were, whether the rent charge created the 3d of *August 1774*, had been extinguished in consequence of any of the facts in the case, and whether the plaintiff could recover his whole rent or any part from *Bonsall*, *Clarkson* having left executors who might have been joined.

Burd for defendant. A right of reentry accrued to *Bonsall* and *Clarkson* in *June 1779*, when they conveyed the new rent to *William White*; and this right vested in him at the same time that he was seized of a part of the old rent. From this fact results an extinguishment of the old rent; for where an actual vested right of entry into land is granted to and accepted by the person who is seized of a rent charge out of the same land, the rent is extinguished. The union in one person of a rent charge and of any parcel of the land from

1809. which it issues, extinguishes the whole rent; *Co. Litt.* 147. *b.*; and so it is if a man has a rent charge out of twenty acres, and releases all his right in one acre. 5 *Bac. Abr.* 694. The right of entry in this case was equivalent to the land. It was an estate in the land, sufficient to support a contingent remainder. 2 *Woodeson* 199. 1 *Fearne* 431. It was a right to hold and receive the profits, which cannot subsist without an estate; *Smith v. Parkhurst* (a); and as a grant of the profits passes the land, *Co. Litt.* 4. *a.* it was in effect a grant of the land.

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But if not extinguished, the recovery cannot be for the whole. *Bonsall* held the land as tenant in common with *Clarkson*; and in such a case, the services issuing from the land are divisible. 2 *Bl. Com.* 193. Covenants in relation to a particular interest, are joint or several according to that interest; and if the covenant be joint, yet if the interest be several, the covenant shall be taken to be several. *Bull. N. P.* 157. So was the resolution in *Slingsby's case* (b). It follows therefore that as the tenancy was in common, and the rent divisible, the covenant in relation to the rent was several, and but a moiety at most can be recovered in this action.

Condy on the same side made two points. 1. That the covenant was several. 2. That the remedy was extinguished, not merely because the rent was gone, but because the plaintiff, having become the assignee of *Bonsall*, was liable to pay all that *Bonsall* was liable to pay.

Upon the *first* point, he argued that the whole was a question of construction, to get the intention of the parties. Had the covenant been joint in terms, it might perhaps have been a different case; such was *Enys v. Donithorne* (c). But here there were no express words, and there was therefore nothing to give a character to the covenant but the estate. If the estate be several, so is the covenant. Upon a warranty to joint tenants, both must sue; but if it be to tenants in common, either may sue. The estate, the rent, the warranty of the estate, and the covenant to pay the rent, are all correlative; and if the first is not joint, neither the services nor covenants are joint.

(a) 3 *Atk.* 140.

(b) 5 *Co.* 19.

(c) 2 *Bur.* 1190.

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Second point. Covenants are express and implied. If I transfer a lease to A., he impliedly engages to pay the rent. He must take the good and the bad together; and if I am compelled to pay, I have an action against him for money paid to his use. Every assignee puts himself in the place of the assignor, and must do his duty if he receives his benefits. *William White* was the assignee of a moiety of the old, as well as of all the new rent. He had a right of entry to compel *Bustead* to pay the old rent, and *Bonsall* and *Clarkson* having parted with all their rights and remedies of every kind, *White* bound himself to pay all that *Bonsall* was obliged to pay. If therefore we pay *Morris* or his representative, our assignee must pay us, which is mere circuitry of action. Suppose *Morris* had never sold the old rent, *White* would have been liable as assignee of the new, and that without taking possession of the land; for although the mortgagee of a term is not bound for rent until he takes possession, it is otherwise with the absolute assignee. By the plaintiff's construction we are liable for the first rent forever, and yet he may debar us from ever recovering it of *Bustead*.

Ted for the plaintiff. There are but two questions in this case. 1. Whether the old rent is extinguished. 2. If not, whether *Bonsall* is liable for the whole.

1. The land itself, and the right to the old rent, never vested for one moment in the same person; and this is essential to the extinguishment of the rent. They must unite absolutely; 3 *Bac. Abr.* 102; a temporary or conditional union will not answer, for that works merely a *suspension*; *Peto v. Pemberton* (a), *Bro. Extinguishment* 17. *Gilb. rents* 149, 50, 55, 78, 79; and here there was no power in the owner of the rent to unite them absolutely, because the right of entry was nothing but a right to hold until payment of the rent, and not to restore the grantee to his former estate. The land, since the conveyance of *Morris*, has never been vested in any one but *Bonsall* and *Clarkson*, and in *Morgan Bustead* and his representatives. To grant the opposite argument, is to agree that what was reserved for the protection of the grantee is his overthrow. The right to enter was one mode of collecting the rent, the covenant was another, and the argument

(a) *Cro. Car.* 101.

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in effect is, that the remedy by covenant is gone by *reserving* the entry; for it is not pretended that it was used, and the case shews it could not be used. The position that *William White* became liable to pay the old rent as *Bonsall's* assignee, is founded in a mistake. He never was their assignee of the old rent, for they never owned it; and when he became their assignee of the new rent, he had no interest in the old; it belonged to *Thomas White*. Two distinct rents may well issue out of the same land; and it is a novel doctrine that the assignee of the last rent becomes liable to pay the first, if his assignor was so before him. The term, that is, the interest in the land, must be assigned, to produce a liability to rent.

2. The covenant is a joint covenant, as much as if it had been so called in the deed. It is a covenant by two to do a particular thing, which upon the death of one survives. The doctrine from *Buller's Nisi Prius*, and *Slingsby's case*, is not to be questioned; but it does not apply. Where a several interest is conveyed, and a covenant made to the grantees jointly and severally, it shall be construed several, for otherwise there might be no remedy; and so *vice versa*. The doctrine therefore applies to covenants made to grantees, in respect of their interest, and not to covenants made by grantees; for one man may well be bound for another. The case of *Enye v. Donithorne* (a) turned upon this ground. The covenant was joint and several; but the several part was disregarded, which made it the same as the present covenant, and the executor of the deceased co-lessee was made to perform the whole covenant, although his co-lessor took the whole land.

TILGHMAN C. J. delivered the Court's opinion.

We are to decide this cause on a case stated, on which several points have been raised.

1. Has the rent charge of 40 dollars created by the deed from *Joseph Morris* to *Clarkson* and *Bonsall*, 3d August 1774, been extinguished?

The principle of law is, that when the right to the land, and the right to the rent, are united in the same person, the rent is extinct. The defendant's counsel have endeavoured to shew, that this union has taken place in the present in-

(a) 2 Burr. 1190.

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stance, because *John Phillips* in whom the title to both the ground rents was vested, derived under the deed from *Clarkson* and *Bonsall* to *William White*, a right to enter on the land, in consequence of the non-payment of the second rent-charge. But this argument is fallacious. When *Bonsall* and *Clarkson* executed that deed, they had no right to the land, and their right of entry was only for the purpose of compelling payment of the rent; and their estate, if they had entered, would have ceased on payment of the rent. Besides, this right of entry has never been exercised by any person claiming under that deed; and to say that it ought to have been exercised, is saying, that when a man has reserved to himself two remedies for recovery of the rent, viz. entry on the land, and an action of covenant, he shall be compelled to relinquish one of them, and take the other, which in the present instance, instead of being a remedy, would be an injury. The fact is, that *John Phillips*, although entitled to both the rents, never had any right to the land, nor had *William White*, under whom *Phillips* claims the second rent-charge. The rent therefore is not extinct, and so it was decided by this court, in *Phillips v. Clarkson and Bonsall*, December term 1800, which was, as far as relates to this point, in all material circumstances the same as the case before us.

2. The defendant's counsel have contended, that supposing the rent to be in existence, *Bonsall* is not liable for more than a moiety of it, because the grant to him and *Clarkson*, was, as tenants in common. But although the land was conveyed to them as tenants in common, they covenanted jointly to pay the rent, and there is nothing illegal or improper in such joint covenant. The case cited from 2 *Burr*. 1190, was much stronger, where the executor of the grantee who died first, was held liable for the whole rent, although the whole interest in the land was vested in the other grantee who survived him, because they covenanted jointly and severally to pay the rent.

This is not at all contradicted by *Slingsby's* case, (5 *Co*. 19.) on which the defendant's counsel have relied. It is there laid down, that if a man by indenture demises *Black Acre* to *A.* and *White Acre* to *B.* and *Green Acre* to *C.* and covenants with them *et quolibet eorum*, that he is lawful

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owner of all the said acres, in that case, in respect of their *several* interests, the covenant is made several. This construction is right, and accords with the intent of the parties, giving to every person the remedy which is necessary for any injury he may sustain; and it is agreeable to the expressions "*et quolibet eorum*," which apply to each *severally*. But to construe the words of *Bonsall* and *Clarkson* as a several covenant, would alter their plain meaning, and deprive the grantee of part of his security, while they were both alive.

A third point was made by the defendant's counsel, that *Phillips* cannot support an action against *Bonsall*, because he is the assignee of *William White*, who was the assignee of *Bonsall* and *Clarkson*. Some confusion is created in this case by the circumstances of two rent-charges arising out of the same land. But when the facts are distinctly stated, it will appear that this last point cannot be supported. The present action was brought to recover damages for non-payment of the *first* rent-charge. Now it is not true that *William White* was assignee of *Bonsall* and *Clarkson*, of this rent-charge, or of any thing relating to it. Nor is there any thing in the deed to *William White*, which directly or indirectly provides or insinuates, that *Bonsall* and *Clarkson* shall be discharged from their covenant to pay the first rent-charge. Indeed it would have been absurd to make such provision; for at that time *William White* had no title to the first rent-charge, or any part of it.

It is therefore the opinion of the court that the plaintiff is entitled to recover damages for the non-payment of the whole rent-charge created by the deed of *Joseph Morris* and wife to *Clarkson* and *Bonsall*.

Judgment for plaintiff.

SMITH *against* DIEHL.

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CERTIORARI to a Justice of the Peace.*Philadelphia,*
Friday,
December 15.

Hemphill for the defendant on this day moved for a priority on the argument list, under rule 55 of the Supreme Court, *April 15, 1781.*

Rule 55 of the Supreme Court, 15th *April, 1781*, does not give a priority to a certiorari to a justice, unless it is claimed before the arrangement of the argument list; and indeed it seems that the Rule is obsolete.

Ingersoll objected to the priority upon three grounds. 1. Because the rule was obsolete. 2. Because it gave a priority merely in the *arrangement* of the list of arguments, which implied that the party must state his claim to the prothonotary before the list was arranged. 3. Because even if the claim could be made after the arrangement of the list, it should have been made, according to *The Commonwealth v. Pascalis*, (a) on the first day of the term.

PER CURIAM. If the court had been called upon to order the clerk how to make out his list, while this rule was in use, they would have directed the priority; but there never has been an application for the benefit of the rule during the argument period. The application is therefore too late, even if the rule is at present in force; but in fact it has not been adopted in practice for many years.

Motion denied.

SCOTT and COMBES *against* ISRAEL.*Philadelphia,*
Tuesday,
December 19.

IN ERROR.

REPLEVIN by *Israel* the plaintiff below for a sow and seven pigs. The cause went to trial in the Common Pleas of *Philadelphia* county upon the issue of property, and the jury found for the plaintiff. The material error now assigned was, that one of the defendants, *Combes*, had not been

A general appearance by an attorney opposite to the names of two defendants, is a good appearance for both, although one has not been summoned.

(a) 1 *Binn. 37.*

1809. summoned, and in fact never appeared or pleaded; but *Armstrong*, an attorney of the Common Pleas, entered his name on the docket opposite the names of both defendants, and put in the plea of property in the short way.

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Brown and M'Kean for plaintiffs in error.

Phillips for defendant in error.

PER CURIAM. We have no doubt in this case. The attorney having marked his name generally, and in no part of the record having declared that he appeared for one in particular, must be presumed to have appeared for both; and the plea entered in this short way, must be referred to the appearance, and be considered as a plea for both. As to the defendant's being summoned, it is not material, he may appear without summons.

Judgment affirmed.

Philadelphia,
Tuesday,
December 26.

BANTLEON *against* SMITH.

The proprietor of a ground rent in fee who obtains a judgment in covenant for the arrears, and sells the land, is entitled to be paid the whole of the rent in arrear out of the proceeds, in preference to older judgments; but inasmuch as he resorts to the land for payment, he cannot have interest upon the arrears.

Q. Whether interest on rent is recoverable in any case.

IN this case *Hopkinson* moved to take out of court the plaintiff's debt, interest, and costs, upon the following facts:

On the first of *April* 1797 the plaintiff conveyed to the defendant a lot of ground, reserving an annual rent of sixty dollars forever, payable half yearly, with power to enter and distrain, and for want of sufficient distress to hold the land *until the arrearages should be fully paid*. The deed also contained a covenant by the grantee to pay the rent; and the rent being in arrear, the plaintiff brought the present action of covenant, and obtained a judgment, upon which the above mentioned lot was taken in execution and sold, and the proceeds were brought into court. There were several judgments prior to the plaintiff's, sufficient to absorb the proceeds of sale; but a priority was claimed by the plaintiff to the amount of his rent in arrear, with interest from the expiration of each half year.

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SMITH.

Hepkinson and Rawle for the plaintiff. The land itself having been liable in the first instance for our arrears of rent, we are entitled to the same priority out of the proceeds of the land. It is analogous to the case of a bond and mortgage, in which an execution and sale under the bond, have never been supposed to extinguish the plaintiff's lien. A factor to whom his principal is indebted the balance of an account, would not lose his lien upon the goods in his hands, by obtaining a judgment; nor would the vendor of an estate be placed upon the footing of a common creditor, by obtaining a judgment for the purchase money, which is precisely our case, for the rent was the consideration of the grant. The plaintiff has three remedies, distress, entry, and covenant; and he may use them all until he obtains a complete satisfaction. The remedy by distress, or by entry for want of distress, is not affected by the judgment in covenant; for although by the judgment the plaintiff is invested with a new remedy by debt or *scire facias*, yet it is still a debt for the arrears of rent to which distress and entry are incident, and so long as it preserves this character, it cannot be denied that he has a lien upon the land and its proceeds. The judgment may alter the security, but it is no satisfaction, and nothing but satisfaction of the rent discharges the land. The opinion of the King's Bench in *Drake v. Mitchell* (a) is in point. In that case the plaintiff had a remedy by covenant against three, and he took a bill of exchange for a part of the debt from one, which he pursued to judgment, and this was said to extinguish the remedy by covenant. But the whole court held, that a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have. The judgment is no extinguishment of the original security, unless it produce the fruit of a judgment. The plaintiff's rights are therefore the same, as they would have been if he had obtained no judgment himself, but the land had been sold under the judgment of another; and in such a case there can be no doubt that his lien would still continue, and he would be en-

(a) 3 East 258.

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titled to prior satisfaction out of the proceeds. The case of *Potts v. Rhodes* (a) in the Common Pleas of Philadelphia, is an express authority for the plaintiff's right to the principal of his rent.

The right to interest depends upon the general rule of law, that the failure to pay an ascertained debt when due, entitles the creditor to interest, either as damages for the delay, or as compensation for the use. Interest is due on all liquidated sums, from the instant the principal becomes due and payable. *Blaney v. Hendricks* (b). So upon a covenant to pay a sum certain. *Treatise on Equity* 118. It is peculiarly the case as to debts arising out of lands which produce a profit. Thus a legacy charged upon lands, carries interest from the testator's death. *Maxwell v. Wettenhall* (c), *Inclendon v. Northcote* (d); and a legacy payable out of a rent-charge, *Stonehouse v. Evelyn* (e). So the arrears of an annuity charged upon land, which is the same as a rent. *Litton v. Litton* (f), *Newman v. Auling* (g). And in *Ferrers v. Ferrers* (h) Lord Chancellor Talbot states the rule to be, that the arrears of an annuity or rent-charge are never decreed to be paid with interest, *except* where the sum is certain and fixed; and also where there is a clause of entry, or some penalty upon the grantor which he must undergo if the grantee sued at law, and which would oblige him to go into equity for relief. Here are both the sum certain, and the penalty of holding possession until full satisfaction, which would include both principal and interest.

Sergeant and Levy for the judgment creditors. We do not contend that rent hereafter accruing is not chargeable

(a) In this case a judgment was obtained in covenant by the proprietor of the rent-charge, and the proceeds of sale of the land being in the sheriff's hands, a rule was granted to shew cause why they should not be paid to the mortgagee of the covenantor. After argument, the following order was made by President Biddle. "Nov. 19, 1791. It is adjudged and ordered that the sheriff pay out of the consideration money arising from the sale of the premises, all arrearages of the rent-charge due and unpaid for the same, as well such as accrued before the judgment in covenant as after, and that the remainder of the consideration money, if any, go towards the discharge of the mortgage."

(b) 2 *W. Black.* 761.

(c) 3 *P. Wms.* 253.

(h) *Cases temp. Talbot* 2.

(e) 2 *P. Wms.* 26.

(f) 1 *P. Wms.* 543.

(d) 3 *Atk.* 438.

(g) 3 *Atk.* 579.

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upon the land, but that the plaintiff has elected a personal remedy, and pursued it to judgment, by which his lien for the arrears is destroyed. The remedies given by the deed are not cumulative as is argued, but they are alternative. The plaintiff may distrain; for want of distress he may enter and hold; or he may resort to the person of the lessee, if he declines the other course. But he cannot enter if there is a sufficient distress, nor can he pursue the covenant to judgment, and then distrain for its satisfaction. The lien of a landlord for his arrears, is founded exclusively upon his right to distrain and for want of distress to re-enter; and if this right is gone, he stands upon the footing of a common creditor. The transfer of the land to a third person does not affect the lien, because the arrears are still rent, to which distress and re-entry are incident; but if the rent is extinguished, the right to distrain, which is dependent upon it, is extinguished also, and with them ceases the lien. Now it is hardly to be questioned that the particular cause of action for which judgment is obtained, is merged in the judgment. By a judgment upon a bond, in Lord *Coke's* phrase, the bond is damned. *Higgins's case* (a). By a judgment in a writ of annuity, the remedy by this writ is taken away, and the annuitant is for ever confined to a *scire facias* upon the judgment. *Ib.* And the reasons for this principle of law are no less politic than sound; the debt having assumed a higher character, it is best for the plaintiff that the inferior debt should be merged, and it is best for the defendant, because it saves him from the vexation of a new action and a new judgment. The cause of action in this suit was the rent in arrear; it was a debt by specialty, which has been converted into a debt of record; it is no longer a rent to be levied by distress, but it is a judgment to be levied by execution, and takes its rank among other judgments solely from its date. The case of *Drake v. Mitchell*, when properly explained, confirms this argument. Lord *Ellenborough* there says, "I have always understood the principle of *transit in rem judicatam* to relate only to the particular cause of action in which the judgment is recovered;" and that is all we ask, because here there was no cause of action but the rent. In

(a) 6 Gr. 44 b.

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that case the plaintiff had two causes of action, a covenant by three to pay an entire sum, and a bill of exchange from one for part; and the judgment on the bill, of course did not extinguish the covenant. Here there was but one cause of action, and it is the conversion of that into a judgment, which takes away the remedy that was incident to it while a rent. It cannot be denied that in an action of debt for the rent, the defendant might plead this judgment in bar. 1 *Ro. Abr.* 358. Suppose a distress and replevin, he might plead in bar to an avowry for the rent, precisely as in bar to debt. 5 *Com. Dig. Pleader*, 3 K. 20. It follows therefore that the distress is gone. The authority of *Lyttleton* is decisive, that if the grantee of a rent-charge recovers by a writ of annuity, which is analogous to an action of debt, the land is discharged of the distress. *Litt. Sec.* 219. *Fitz. N. B.* 152. He makes his election of the personal remedy, and if he goes no further than to appear and count, still his election is determined, and he cannot distrain. *Co. Litt.* 145 a.

Interest in a case of this kind does not follow the general rule, for two reasons; first, because rent itself is interest, and secondly because it is the landlord's duty to make his demand on the land, and he has in his own hands the means of preventing delay. The common practice in equity is not to allow interest on arrears of rents, profits, or annuities; 2 *Dall.* 105, *note*; it is done only in certain excepted cases, where the arrears are great, or where such funds are assigned for the maintenance of children or widows, or as portions. *Michelthwaite v. Boatman* (a), *Batten v. Earnley* (b). If the tenant forfeits his estate at law, and the landlord exercises his right of entry, the tenant by being forced to ask equity may be laid under terms; so is the opinion of Lord Talbot in *Ferrers v. Ferrers*. But in this case there was no penalty; the entry was to hold until payment of the rent, on which event the possessory right of the tenant would revive, and he could regain the land without the aid of equity.

In reply it was said that the doctrine of annuities was wholly inapplicable to a rent reserved, for in such a case the writ of annuity does not lie. *Co. Litt.* 144 a. 1 *Ro. Abr.* 256.

(a) 1 *Chan. Rep.* 184.(b) 2 *P. Wms.* 163.

It is a personal remedy to recover a rent-charge which a man grants out of his own lands; and so distinct is this rent from a rent reserved, that after judgment in the writ of annuity, the grantee can never resort to the land even for the subsequent rent. If this argument therefore has any weight, it annihilates our rent, and even our personal remedy hereafter, because we cannot like the annuitant have a *scire facias* upon our judgment, for what shall hereafter accrue. The doctrine from *Comyns* is not correctly taken. *Rolle* does not say that the judgment, but that the *recovery*, in covenant may be pleaded in bar to debt; which is the distinction in *Druke v. Mitchell*; and the several bars to an avowry which are mentioned by *Comyns*, shew that he also intends an actual satisfaction or what is tantamount; as *non demist, nil habuit in arrearis*, nothing in arrear.

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TILGHMAN C. J. delivered the court's opinion.

The plaintiff in this suit, by indenture between him and the defendant, granted to the defendant a parcel of land in fee, out of which he reserved an annual rent-charge of sixty dollars. The deed contained a power to the grantor to re-enter in case of non-payment of the rent, and to hold the land till the arrears of rent were discharged. It also contained a covenant on the part of the defendant to pay the rent. The plaintiff brought an action of covenant for non-payment of the rent, and obtained a judgment on which an execution issued, by virtue whereof the land was sold, and the money proceeding from the sale brought into court by the sheriff. This money is claimed by creditors of the defendant who obtained judgment prior to the plaintiff.

Two questions have been brought before the court. 1st, Whether the plaintiff shall be allowed to receive, out of the money, the amount of the arrears of rent. 2d, Whether he shall receive the interest on the rent.

The defendant's counsel have endeavoured to prove by a very subtle argument, that in consequence of the plaintiff's judgment, the land was totally discharged of the rent. If the law be so, it is incumbent on the defendant to prove it by clear authority; for it is a doctrine which bears very hard upon all persons who hold rent-charges. Cases were cited to shew that a writ of annuity lies for arrears of a rent-charge,

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and that after judgment obtained in a writ of annuity, the land is discharged and a distress cannot be made. Upon examining these cases, and those cited on the same subject by the plaintiff's counsel, it will appear that the rent-charge there spoken of was not of the nature of the rent now in question. It was the case of a man who granted to another and his heirs, a yearly sum of money, and charged it on his land, with power to the grantee to distrain. In such cases, the law gives to the grantee of the rent an election either to charge the person of the grantor by a writ of annuity, or to have recourse to the land by distress. Having made his election by recovering judgment in a writ of annuity, the land is discharged, and his remedy is personal only. If there shall be new arrears after the judgment in annuity, a *scire facias* must be sued out on the judgment. But the law is not so in a case like the present, where the grantor in the indenture grants the land itself, reserving a rent; for there no writ of annuity lies. There is no analogy therefore between the two cases.

The defendant next resorted to another argument. The rent, says he, is *extinguished* by the judgment. To prove this, was cited 6 Co. 45, *Higgins's case*, where it is said that an action of debt will not lie on a bond on which judgment has been obtained. Certainly it will not; and why? Because the *bond debt* is merged in the judgment, which is a debt of record. The obligee in the bond loses nothing by this; for although the bond is extinct, the *debt* is not. On the contrary, it has become a debt of a superior nature, which may be recovered by a *scire facias* or action of debt on the judgment. So by virtue of the judgment in the case before us, the rent recovered is no longer a debt of specialty on which an action of covenant lies, but a debt of record. But the rent still exists, or in other words there still exists a debt on account of the arrears of rent. *Higgins's case* only proves, that the remedy for those arrears by action of covenant is gone, but it does not prove that the rent is extinct, or the land discharged. The defendant's counsel cited 5 Com. Dig. Pleader 3 K. 20, where the law is thus laid down. "In bar to an avowry for rent, the defendant in replevin may plead in bar, as in debt for rent." After this general position, for which we have only the authority of *Comyns*, he goes on to give examples

of pleas which may be put in, *nil habuit in tenementis, non demisit, nothing in arrear*. Now all those pleas go to prove that no rent, no debt of any kind, is due; and if the author's meaning be taken in this restrained sense, his principle is undoubtedly true; for nothing is plainer than that a man cannot distrain for rent where no rent is due. But if it be contended that the meaning of *Comyns* is that no distress will lie where judgment in an action of debt for the rent has been obtained, without any satisfaction, I can only say that he has cited no authority to support his assertion. In the common case of a mortgage and bond for the same debt, I have never heard it doubted that an ejectment would lie for the land after judgment had been obtained on the bond, provided the money was not paid; and if the deed of mortgage contained a covenant of the mortgagor to pay the debt, I see no reason why an ejectment should not lie after judgment in an action of covenant. This is not unlike the case of rent, where a double remedy is given for a recovery of the same debt, one against the person of the debtor, and one against the land.

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If therefore this matter rested solely on the reason of the thing, and the cases cited on the part of the defendant, I should incline to the opinion that the land remained charged with the rent. But the plaintiff's counsel produced a manuscript case of *Potts v. Rhoads*, where this very point was decided by the late President *Biddle*, after argument in the Common Pleas in the year 1791. This opinion is entitled to great weight; for Mr. *Biddle* was not only well versed in the principles of the law, but remarkably well acquainted with the practice, having held the office of deputy prothonary of the Court of Common Pleas many years before the revolution. On the whole, the opinion of this court is that the plaintiff is entitled to receive the arrears of rent.

But shall he have interest on these arrears? The counsel on both sides have gone pretty largely into the argument, whether in general interest is recoverable as damages in an action of debt or covenant for rent. The court mean to confine their opinion to the case before them; and they think the plaintiff is not entitled to interest, because as to the present question he seeks his remedy by resorting to the land only. If a man distrain for rent, he must distrain for the

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precise sum due. He cannot add interest to the arrears. If the plaintiff had entered on the land by virtue of the power in this deed, he could only have held till the arrears were paid. We do not say how the case would be, if the deed gave him power to enter and hold as of his former estate; for in that case his former estate in fee being revested in law, the defendant would be driven to equity for relief, and in equity it might be thought reasonable to relieve on terms of paying interest. The defendant's counsel cited cases to that point. With respect to the recovery of interest in general in personal actions for rent, the court desire that no inference may be drawn from their present decision. The late proprietaries of *Pennsylvania* were in the habit of receiving the arrears of their rents without interest. With respect to those rents, the law has been taken for granted that interest was not recoverable. Hence many persons have supposed that in no instance can interest on rent be recoverable. When the point is brought forward, the court will decide it; at present they only declare that they consider it as fully open to discussion.

BARING assignee of CUTTING against SHIPPEN.

Philadelphia,
Tuesday,
December 26.

IN ERROR.

The assignor of a bond is a competent witness to prove that it was fraudulently obtained by him, or that it was given to raise money for the obligor, and that he used it to pay his own debt.

The plea of "layman and unlettered" &c., is not necessary in *Pennsylvania*. Fraud either in the execution or the consideration of a bond may be given in evidence under the plea of payment.

UPON error to the Circuit Court of *Bucks* county the case was thus:

On the second of *November* 1798 the defendant signed a bond and warrant of attorney for the payment of six thousand dollars to *John Browne Cutting*, who on the 15th *November* assigned it under his hand and seal in the presence of two witnesses, to *Baring* the plaintiff; and on the 2d *July* 1800 judgment was confessed in the Common Pleas of *Bucks* county. On the 2d *May* 1801 the defendant moved the court to stay proceedings, upon an affidavit which stated, that at the time she signed the bond and warrant, she was not indebted in any sum whatever to *Cutting*, nor did she

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know at that time nor for a long time afterwards, that she had signed and executed such instruments; but that they had been obtained by the fraud and artifice of *Cutting* as a power of attorney and duplicate, to enable him as her agent to transact some business at *Antigua*. The court thereupon made an order to stay proceedings on the judgment, and that the defendant should be at liberty, under an issue to be formed between the parties, to shew want of consideration or fraud in the execution of the bond, and that the jury impanelled in the cause should decide whether any thing and how much was due. The cause was then removed by consent to the Circuit Court, where an issue was formed upon the plea of *payment*, with leave to give the special matter in evidence.

While the cause was pending in the Common Pleas, a rule was entered for a commission to examine witnesses in *Antigua*; but the defendant having obtained *Cutting's* answer to a bill in chancery, it was agreed by the plaintiff's attorney, that, excepting a certain letter therein contained from *Cutting* to *Manley*, the answer might be read in evidence as if regularly taken under a commission, subject to all legal exceptions at the trial.

Accordingly upon the trial of the cause in *May* 1803 before the late Chief Justice *Shippen* and Mr. Justice *Brackenridge*, the defendant offered in evidence the answer of *Cutting*, which in effect was as follows:

He admitted the execution of the bond on the 2d *November* 1798, at which time he believed the complainant (Mrs. *Shippen*) was indebted to him about three hundred and fifty dollars for disbursements or engagements on her account. That he commenced his agency in her affairs sometime in *September* 1798, when he possessed her entire confidence; and that in *October* following she informed him that she was in pecuniary distress, and that she had occasion for actual supplies in her ordinary expenditure, and also to carry on her affairs relative to her landed property. That he suggested to her whether money might not be raised by her note or bond; but she seemed to think otherwise; upon which he mentioned to her the opinions of several gentlemen of the law, and among others of Mr. *Dallas*, and he produced an opinion of that gentleman and was proceeding to read it, and

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to place before her the real state of her affairs, when she interrupted him by saying she gave him unlimited authority to act for her as he would for an only sister, *and that whatever papers he thought necessary to carry on his agency, she would execute.* That conceiving from these expressions that she had left the mode of raising money for her use entirely to his discretion, he got a blank printed bond and filled up the blanks with the sums before mentioned, and also procured two letters of attorney to be drawn to authorize him to act in her various affairs. That the bond and letters of attorney were executed by her at her house near *Bristol in Pennsylvania*, in the morning of the 2d *November 1798*; and that when he produced the bond and letter of attorney to her, it was in the presence of four persons, two of whom signed as witnesses. *That he requested her to peruse the same, and that the papers remained on a table in her library several hours before they were executed.* He denied that he told the complainant that the bond was a duplicate or counterpart of a letter of attorney, but he admitted that he did not inform her of the nature of the bond or letter of attorney; and after they were executed, *he desired her to read them, but she refused, and told him to act for her as for his only sister, without adverting to any opinion or perusals on her part.* He admitted also, that on the 15th *November 1798* he assigned the bond to *Alexander Baring* to countersecure the sum of 2470 dollars, for which he had just before given *Baring* a promissory note. That in *March or April 1798* he drew a bill of exchange upon his brother in *Hamburgh* for 2000 dollars in favour of *Baring*, which was returned protested in *November*, when he was called upon by *Baring* for principal &c. amounting to 2470 dollars; and he gave him his promissory note for the sum payable in *May 1799*, and the assignment before mentioned as a security. *That he never had any conversation with Mr. Baring either before, at, or after the assignment, touching or concerning the manner of obtaining the said bond from the complainant.* That at the time he obtained the bond, he had no intent to defraud the complainant, but merely to raise money upon the same for her use, which he unsuccessfully attempted to raise; and that when he made the assignment he entertained hopes and well grounded expectations of paying *Baring* his demand at

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the time stipulated in the note, which he really intended to pay. That on or about the 10th *September* 1799 he wrote and sent a letter to *John C. Manley* merchant in *Charleston S. C.* his attorney, in the following words. [This letter was excepted in the plaintiff's agreement.] He admitted that the complainant arrived in *Antigua* about the time mentioned in her bill of complaint, and that he had a conversation with her in which she severely reproached him for his conduct in obtaining and assigning the bond, and he did not contradict any thing said by her. That on the day following, he and *H. B. Lightfoot* esquire met the complainant at her lodgings, where she asked him whether she owed him any money on the said 2d of November 1798, and that he answered "no," not at that time recollecting what moneys he had expended on her account; and that she also asked him whether he had not assured her that the said bond was the counterpart of a letter of attorney, and that he did not to such question answer in the affirmative or negative. That the said *Lightfoot* did propose that he should execute a release to the complainant, to which he assented; and that he did then and afterwards in another conversation held with the defendant, declare that he never meant to exact 6000 dollars from her, that he had erred in not informing her of the assignment, that he had endeavoured to make reparation, and that it was owing to the death of *Manley* his attorney, and his own absence from the *United States*, that *Baring's* debt remained unpaid, and the bond uncanceled.

To this evidence the plaintiff's counsel objected. But after argument the court overruled the objection, and signed a bill of exceptions, which, after setting forth in the usual form the evidence which the defendant had produced to maintain the issue on her part, stated the plaintiff's exception in the following manner: "To which evidence the counsel for the plaintiff objected, and did insist that the several matters and things contained in the said answer were inadmissible, and by the rules of law ought not to be admitted in evidence on the part of the defendant, who, at the time of giving the said bond was, and still is, a person learned in the English language, and capable of reading and understanding the same in writing and in print, and also because the said *John Browne Cutting*, to whom the said bond had

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"been made, and who had assigned the same to the plaintiff, "*was not a competent witness for the purpose aforesaid; and* "*prayed the court that they would not permit the said several* "*matters and things to be given in evidence to maintain the* "*said issue on the part of the defendant. Nevertheless the* "*court were of opinion that the said several matters and* "*things were proper &c."*

Hare for the plaintiff argued upon two general exceptions to the evidence. 1. That *Cutting* the assignor was not a competent witness to defeat the bond. 2. That the matters contained in his answer were not competent testimony under the issue that was tried, or under the circumstances of the case.

1. *Nemo allegans suam turpitudinem audiendus est*, is a maxim as old as the civil law; and it has been enforced as a rule of evidence in common law courts, by some of the ablest judges in *England*. This, together with a rule of law founded on public policy, disqualified *Cutting*, who not only proved his own fraud, but had signed the instrument he was called to defeat. "No party," says Lord *Mansfield*, "who has signed a paper or deed, shall ever be permitted to give testimony to invalidate it." *Walton v. Shelley* (a). The same doctrine was adopted in *Hart v. M'Intosh* (b), and in *Phetheon v. Whitmore* (c). Lord *Kenyon's* leaning it is known was the other way. He shewed it first in *Bent v. Baker* (d), where he took the distinction between negotiable and other paper, and allowed the application of the rule to instruments of the former kind. In *Adams v. Lingard* (e) he denied it altogether, and adhered to that opinion in *Jordaine v. Lashbrooke* (f). In this last case, where for the first time *Walton v. Shelley* was formally denied, it is to be remarked that *Ashhurst* decidedly adhered to the opinion he pronounced in that case, and stated the principle of the determination to be, that no person is a competent witness to impeach a security which he himself has given a sanction to; that both *Grose* and *Lawrence*, who agreed in admitting the witness, relied mainly upon the importance of such testimony where the public revenue was concerned, and appeared to take that as a distinction; and that the rule laid down by

(a) 1 D. & E. 300.

(c) *Peake's N. P.* 40.(e) *Peake's N. P.* 117.

(b) 1 Esp. 298.

(d) 3 D. & E. 35.

(f) 7 D. & E. 601.

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Lord Kenyon himself is obviously too narrow, and would cut off some of the best established principles of the law of evidence. He understands the rule to be that, "where a witness is infamous and his record of conviction is produced, or where he is interested in the event of a cause, he cannot be received; but to carry the rule beyond that, would be extending it farther than policy, morality, or the interests of the public require." In this rule there is no exception for the case of husband and wife, none for the case of a witness who comes to prove bastardy after the death of the parents, or to disprove a marriage after thirty years' cohabitation; nor is there any for the case of instrumentary witnesses, whose competency to give evidence against their attestation he indeed affirms, although *Lord Mansfield* and the whole court of King's Bench ruled otherwise in *Goodtitle v. Clayton* (a), and ordered a new trial because they had been admitted. The principle of *Walton v. Shelley* has however been recognized in *New-York*, in the case of *Baker v. Arnold* (b), and in this state in the cases of *Stille v. Lynch* (c) and *The Commonwealth v. Ross* (d); and it is not now to be questioned before this court. But to prevent its effect upon this cause, it will be said that it is confined to negotiable paper. Now there is nothing like such a distinction in the terms of the rule laid down by *Lord Mansfield*, nor is there any reason for the limitation. Public policy is the foundation of the rule; the policy of protecting securities against the fraud of a party who has at one time asserted their validity, by giving them currency; and many of the most important securities in commercial use, policies of insurance, bills of sale &c. are not negotiable. In *Pennsylvania* particularly, there should be no distinction in this respect between a bond and a note. They are put upon the same footing by the act of 1715. 1 *St. Laws* 107. Both the legal and equitable interest in a bond pass by an assignment under seal before two witnesses; and an instrument assignable in this manner is negotiable. To apply the rule to a stock contract, which was held to be negotiable in *Reed v. Ingraham* (e) or to a bill of lading; *Lickbarrow v. Mason* (f) and not to such a

(a) 4 *Burr.* 2224.(b) 1 *Caines* 260.(c) 2 *Dall.* 194.(d) 2 *Dall.* 239.(e) 3 *Dall.* 505.(f) 2 *D. & E.* 71.

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bond, is to create a distinction where there is no difference. In *Davis v. Cammel* (a) and in *Cook v. Ambrose* (b) it was in fact applied to a bond.

2. The evidence was not competent in itself. It was intended to shew that the defendant had signed the bond, when she meant to sign a letter of attorney; but she was desired to read it, and refused; and in such a case she is bound by it, though penned against her meaning. *Throughgood's case* (c), *Pigot's case* (d), *Moore* 184. *Skinn.* 159. 2 *Freem.* 194. Her only remedy was to plead that she was unlettered and could not read, and so conclude that it was not her deed. The evidence was not competent even as an equitable defence, for it shewed that she was imposed upon through her own fault, which destroyed her equity. *Osmond v. Fitzroy* (e). At law therefore the evidence was improper upon the plea of payment, and it was bad in equity, because it shewed that she had none, and that the plaintiff had both the equity and the law.

Lewis on the same side cited *Charrington v. Milner* (f), and *Humphrey v. Moxon* (g) where Lord *Kenyon* said the courts had laid down a rule that a man should not destroy his own security; and *Lekeux v. Nash* (h) and *Humberton v. Howgil* (i) to prove that the fraud could not be shewn under the plea of payment. He said also that he should make another point, that the conversations between *Cutting* and the defendant at *Antigua*, set forth in the answer, were clearly inadmissible, and that the judgment must be reversed for that if for no other cause.

Hopkinson for the defendant insisted that the argument should be confined to the two exceptions taken at the trial, that *Cutting* was not a competent witness, and that the defendant should have pleaded "not lettered" &c.; the bill of exceptions stating these only, and all other exceptions having been waived by the plaintiff's attorney below, and by Mr. *Lewis* himself.

(a) *Addison* 233.

(b) *Addison* 323.

(c) 2 Co. 9 b.

(d) 11 Co. 27.

(e) 3 P. Wms. 130.

(f) *Peake's N. P.* 6.

(g) *Peake's N. P.* 52,

(h) 2 *Stra.* 1221.

(i) *Hob.* 72.

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This being denied by Mr. *Lewis*, the court directed affidavits to the point; and at a subsequent day Mr. *Hopkinson* produced his own affidavit and that of Mr. *Tilghman* his colleague on the trial, and a letter from Mr. *Ewing* the plaintiff's attorney dated the 17th *October* 1807. At the same time he cited the following cases to shew that an agreement between the counsel below is binding in error, and that the plaintiff could not take an exception which he had omitted at the trial, and did not state in his bill. *Russel v. Union Insurance Company* (a). *Johnson v. Chaffant* (b). 3 Bl. Comm. 372. *Tidd's Prac.* 314. Mr. *Lewis* on the other hand produced his affidavit, denying an agreement to waive any particular exception; and he insisted that his exception at the trial, and the bill before this court, were comprehensive enough to include every thing, being to all and every part of the evidence, and that he was not bound to be more explicit.

On this part of the argument, it is unnecessary to say any thing further, as it is very fully detailed in the opinion of Judge *Yeates*. On the two principal points,

Hopkinson and *Tilghman* for the defendant argued in the first place, that *Cutting* was a competent witness, and that a common law case to the contrary was not to be found either in *England* or *America*. *Walton v. Shelley* was the first case in which a judicial sanction was given to the principle, that a witness, without being either infamous or interested, was incompetent, if his testimony impeached an instrument which he had signed. In scarcely an instance has the decision been noticed without this remark; and in many subsequent cases the proposition has been denied altogether, while in every one it has been limited to precisely the same case as *Walton v. Shelley*, a case of negotiable paper. As early as Queen *Ann's* time, a witness who had conveyed lands, was allowed to prove that he had no title; *Title v. Grevett* (a); which is in direct collision with the broad rule laid down by Lord *Mansfield*; and the same principle was recognized not only in *Jordaine v. Lashbrooke*, but in *Balliot's Lessee v. Bow-*

(a) 4 Dall. 421.

(b) 1 Binn. 75.

(c) *Ld. Ray.* 1008.

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man (a) decided at the *Northampton Circuit* in *May 1802* by Chief Justice *Shippen* and Judge *Smith*, and in *Hurst's Lessee v. Lowder* at *Nisi Prius* in *March 1803* before the same Judges and Judge *Brackenridge*, where the grantor of an estate was examined to defeat the defendant's title derived from him. So in *Lowe v. Jolliffe* (b) the attesting witnesses to a will were permitted to give evidence against it. Lord *Mansfield* had a strong leaning to the civil law; he was educated in it; and he was desirous to ingraft its principles upon the law of *England*. The maxim upon which he relies, is disregarded every day in the case of accomplices, who are never rejected for incompetency; and, excepting Justice *Ashhurst* who joined with him in the original decision, there has not been a judge in *England* since his time, who has not disavowed the rule. In *Bent v. Baker*, *Buckland v. Tanhard* (c) and *Jordaine v. Lashbrooke*, its propriety, even in relation to negotiable paper, was drawn in question; but Mr. *Hare's* cases shew that it has never been carried further than this; and what is decisive in the present instance, the Supreme Court of this state held, in the case of *Pleasants v. Pember-*

(a) *BALLIOT'S Lessee v. BOWMAN.*

The defendant made title under a warrant to *Christopher* and *Jacob Seyberling*, and a deed poll from *Jacob* to *Christopher*, and from *Christopher* to defendant.

By the plaintiff's evidence it appeared that *Christopher* and *Jacob Seyberling* had come into possession of the premises under the title by which the plaintiff claimed, and afterwards took out a warrant for the same land to raise a new title in themselves, and to cut out the other.

To explain this transaction, and to remove the imputation of fraud from it, *Jacob Seyberling* was called as a witness.

Sitgreaves objected to his competency, 1. Upon the ground of interest; but this was obviated by a release. 2. Because he could not be a witness to support his own title.

PER CURIAM. If the witness is disinterested in the event, we cannot see the force of the objection. It has been ruled that a man may be a witness to prove he had no title to land which he conveyed; 2 *Ld. Ray.* 1008. and the same principle has been recognized in a late case. 7 *D. & E.* 601. If a man may be a witness to impeach, why may he not to sustain a title made by him, provided he is not interested in the event? The question turns exclusively on the point of interest; and courts of late, lean strongly against objections to the competency of witnesses.

(b) 1 *W. Black.* 365.

(c) 5 *D. & E.* 579.

ton (a), that the general expression in *Walton v. Shelley* must be limited as it was explained in *Bent v. Baker*, that is, to negotiable instruments. In the cases from *Addison* the witness was rejected because his parol testimony was offered to alter the bond. The only question then is, whether a bond in *Pennsylvania* is a negotiable instrument. Before the act of 27th February 1797, 4 St. Laws 102, there was no negotiable instrument in *Pennsylvania* but a bill of exchange. That act gave this character to notes of a certain description, but to nothing else. If there is no defence by either payer or indorser, except what appears on the note, then it is negotiable; but if it is liable in the hands of every one to the discount, and objections of the payer, then it is assignable merely; and this is beyond all doubt the situation of a bond. The rule in fact has no reason except in reference to instruments of the former kind, the currency of which it is important to free from every restraint. In the other cases it is not only conformable to law, but to policy, to exclude no witnesses but such as are infamous by conviction, or interested in the event of the cause.

In the second place, whatever may be the law of *England*, it is settled law in this state, that fraud and want of consideration may be given in evidence under the plea of *payment*, whether lettered or unlettered. It is a practice introduced to supply the place of a court of Chancery: *Swift v. Hawkins* (b), *Hollingsworth v. Ogle* (c). It is regulated by an express rule of this Court, requiring notice, which was accordingly given to the plaintiff; *Rule 39. Sup. Cur.*; and it was part of the order of the Common Pleas in the present case, that such evidence might be given. The defendant's imprudence, her want of equity, and the case of the plaintiff with all its merits, were for the consideration of the jury; they could not in any degree affect the competency of the evidence.

Lewis in reply, said that he was not disposed to controvert the rule in *Title v. Grevett*, which had been adopted in this state; but it was a severe rule which merited no extension, and it was no authority for permitting a witness to de-

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(a) 2 Dall. 197.

(b) 1 Dall. 17.

(c) 1 Dall. 260.

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feat his own assignment. The title to real estate is a matter resting upon documents which every one may examine for himself; the validity of a bond may be affected by facts which attend its execution, and the assignor engages by his assignment that none such exist. To permit him after this engagement to give evidence of his own fraud in overthrow of the bond, is to open a door for combinations to commit fraud; and it is as correct a rule of evidence to exclude a witness who would thus testify to his own infamy, as a witness against whom a record of conviction is produced. The case of *Lowe v. Jolliffe* is also very different from this. The witnesses by their attestation did not declare the validity of the will, but the fact of sealing and publication; and they swore that the testator was *non compos*. They however were not objected to, and in the later case of *Goodtitle v. Clayton*, it appears that an objection to their competency would have been allowed. The decisions before *Walton v. Shelley* therefore do not contradict Lord *Mansfield's* rule; and Lord *Kenyon*, who first denied it, and led the opposite opinion, has been so inconsistent with himself in the cases from *Peake* 6. 40. 52. 107, that he ought not to have the weight of a feather against such men as Lord *Mansfield*, *Yeates*, and *Buller*. The rule has certainly been recognized here in its broadest terms; for in *Stille v. Lynch* this Court said that the witness was not competent, as he was offered to *invalidate his own instrument*: and in *Pleasants v. Pemberton* what was said by the Chief Justice as to *Walton v. Shelley* was a *dictum*, for he decides that the witness did not come to contradict the writing or any thing that was in it. Whether an instrument shall be negotiable, depends upon the will of the parties. A stock contract, and a bill of lading have been so considered. A policy of insurance is not. It is not assignable in its terms; and when it is transferred, nothing but an equity passes. But a bond is as negotiable as a bill of lading. The act of assembly prohibits the assignor from releasing the debt, intending that neither interest nor power shall remain in him, and that all shall go to the assignee.

The rule of Court and the decisions upon giving fraud in evidence under the plea of payment, are not denied; but they are confined to fraud in the consideration, and not in the execution of the bond. In the latter case the only answer to

the bond is, that the party was incapable of reading, and that the bond was misread, and then it results that it was not her deed.

But at all events the conversations at *Antigua*, long after the bond was assigned, ought not to have gone to the jury, and for this reason certainly the judgment should be reversed.

Cur. adv. vult.

TILGHMAN C. J. I shall consider this cause under three points of view.

1. Was any part of *Cutting's* answer evidence?
2. Was there any part of it which was *not* evidence?
3. If there were parts not evidence, have any circumstances arisen, which preclude the plaintiff from the benefit of his exceptions?

1. Several objections have been made to the answer of *Cutting in toto*. First, it is said, that he was an incompetent witness, because he had assigned the bond which his testimony tends to invalidate. It is not pretended that he was interested in supporting the defendant's plea. On the contrary, if he had any interest, it would have been promoted by the plaintiff's recovery. By the principles of the common law, every person not interested, and not of infamous character, may be a witness. This principle was first broken in upon in the case of *Walton v. Shelley*, where from motives of policy it was decided that a man should not be allowed to invalidate an instrument to which he had given credit, by signing his name. The rule thus broadly laid down, has since been denied in *England*, particularly in the case of *Jordan v. Lashbrooke*, 7 D. & E. 601. But what is much more to the purpose, the rule was confined to *negotiable instruments* by a decision of this Court, in *Pleasants v. Pemberton*, 2 Dall. 196. and the law has since been considered as settled. But it is contended, that granting the law to be so restricted, still *Cutting* was incompetent, because a bond is a negotiable instrument, being assignable by an act of assembly. But though assignable, I do not consider it as coming within the mercantile idea of a negotiable instrument, because it is liable in the hands of the assignee to every plea discount and objection, which might have been offered by the obligor against the obligee. As to that kind of negotiable paper (such as

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bills of exchange &c.) which passes by indorsement, and is held by the indorsee, not subject to any right of discount existing between the original parties, there may be great public convenience in the rule which prevents any one from impeaching by his testimony the writing to which he has given credit by his name; but there is no such necessity in case of bonds, where every assignee knows that he takes the paper liable to objections. It never has been decided, that the assignee of a bond is an incompetent witness; and as it is not quite clear to me, that courts have a right to set aside principles of law from motives of policy, I am not for extending the rule farther than it has been already carried. Next it has been urged, that *Cutting's* testimony was altogether improper, because Mrs. *Shippen* could read, and ought to have examined the bond before she executed it. If issue had been joined on the plea of *non est factum* in *England*, this, in a court of common law, might have been a good objection. But the parties stand in our courts, on a different footing. By a rule of Court, matters that shew fraud or want of consideration, may be given in evidence under the plea of payment, notice being given to the adverse party. In this case notice was given. Now who can say that the answer of *Cutting* is not material to prove fraud? It tends to prove that a bond, which was given by Mrs. *Shippen* to him, for the sole purpose of raising money for her use, was applied by him to the purpose not of raising money at all, but of paying a debt of his own. If Mr. *Baring* had applied to Mrs. *Shippen* before he took the assignment, (which in prudence he ought to have done) he would have found at once that *Cutting* was acting a fraudulent part, and the mischief would have been prevented; not having done so, he took the assignment at his peril, and has no right to complain of the defence set up against him.

2. But are there no parts of the answer which were not legal evidence? Undoubtedly there are. I think that has not been denied by the defendant's counsel; indeed it could not have been denied with any hope of success. The answer contains conversations between Mrs. *Shippen* and *Cutting* in *Antigua*, long after he made the assignment, which certainly are not evidence against *Baring*. The plaintiff has excepted to all and every part of this answer. It is true, consent had

been given, that the answer should be read; but it was subject to all legal objections, and it is perfectly understood that this reservation gives the right to object to particular parts as well as the whole, and this is every day's practice. This brings me to the third point.

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3. Is there any thing to preclude the plaintiff from the benefit of his bill of exceptions in its full extent? It is said that there is. Affidavits have been read, to prove that it was understood at the trial that no objections were to be made in this Court, but those which went to the answer of *Cutting in toto*. To these affidavits of the defendant's counsel, a counter affidavit has been filed by the counsel for the plaintiff. But no agreement appears upon the record; and sitting here in a court of error, I do not think myself at liberty to go out of the record in order to form a decision on facts which are disputed. If it was confessed that such an agreement had been made, means might be found to do justice. But under the present circumstances, I am afraid of setting a precedent which may be attended with dangerous consequences. Confining myself to the record, I must say that the plaintiff's exception has been supported. At the same time I cannot help adding, that it may tend to obstruct the administration of substantial justice, if at the trial of a cause, objections are brought forward and urged, which go to the whole of a deposition, while others are kept back, (though included under general expressions in the bill of exceptions) which are good as to particular parts, and those perhaps not very material. It takes the adverse counsel by surprise, who in many instances would strike out the objectionable parts as soon as they were pointed out; and it keeps the court in ignorance, who may have their judgment reversed on a point on which they gave no opinion, and which was not even submitted to their consideration. I think it my duty therefore to express my hope, that in future, when objections are intended to be made against particular parts, they will be brought forward, and distinctly stated in the bill of exceptions.

On the whole it is my opinion that the judgment of the Circuit Court be reversed, and a *venire facias de novo* awarded.

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YRATES J. On the fullest reflection, I am of opinion, as well upon general principles and the rule of this Court, as upon the terms under which the proceedings upon the judgment entered in this action, were stayed on the 2d May 1801, that the *general* matters contained in the answer or deposition of *John Browne Cutting*, might well be given in evidence under the plea of payment, with notice of the special matters. They tended to avoid the bond, by shewing that it was made use of for a very different purpose, from that for which the deed was executed by the defendant. It is clearly settled that an obligation in the hands of an assignee, is subject to all the equity which could have prevailed against the original obligee. The circumstance of *Mrs. Shippen* not being unlettered, forms in my idea no difference. I am further of opinion, that *Cutting* was a competent witness to establish the several facts within his own knowledge previous to the assignment. The cases cited by the defendant's counsel, in my apprehension abundantly prove both positions. I will not enter into a detail of them, but will content myself with observing that the rule, that a party shall not be permitted to give evidence to invalidate an instrument which he has signed, has been confined by a decision of this Court to negotiable instruments, in *Pleasants v. Pemberton*, January term 1793. 2 *Dallas* 196. The only difficulty which strikes me in the case is, whether suffering the conversations, inserted in the deposition, which took place between *Cutting* and the defendant at *Antigua* in 1801, to go to the jury, was error or not, under all the circumstances of the case.

I agree that sitting as a court of error, we are confined to matter of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support them. 3 *Bla. Com.* 405. The rule laid down is, that the plaintiff in error is confined to the objections taken at the trial, and stated on the face of the bill of exceptions; and was so decided in the house of lords in a case of *Rowe v. Power* on a bill of exceptions from *Ireland*. 2 *New Rep.* 36. and cited in *Kensington v. Ingles et al.* 8 *East* 281. And I also agree that the evidence excepted to was inadmissible on abstract principles, because the conversations alluded to happened more than two years after *Cutting* had assigned the bond to the plaintiff, and therefore were in truth, *res inter alios acta*.

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Whether such facts exist in this case, of which the court can legally take judicial notice, as would prevent the plaintiff from taking advantage of this error, is a question which necessarily demands consideration. It led during the argument to a very unpleasant discussion, which the court greatly regretted. If there were no decisions on the subject, it would be just and reasonable, that the act of the attorney should bind the client; but the law is clearly so settled. 1 *Salk.* 86. *Carth.* 412. 1 *Dall.* 164. A writ of error cannot be taken out against the agreement of the attorney. 1 *H. Bla.* 21. 2 *T. R.* 183. The court will order a *non pros.* to be entered when the writ of error has issued; 1 *T. R.* 388. and where a defendant undertook in a cause at law not to bring a writ of error for delay, or to file a bill in equity for an injunction, and he afterwards filed a bill in chancery for a discovery, the Master of the Rolls said, that although the agreement was not a good plea to the bill for a discovery, yet he would not suffer him after such an agreement to come for an injunction. 4 *Bro. Cha. Rep.* 499. And so far have the agreements of counsel been carried in this court, that in *December* term 1803, where the plaintiff's declaration below was materially defective, we gave leave to amend after a writ of error brought, without costs, upon a certificate of the adverse counsel that he had assented to such amendment previous to the trial in the court below. 1 *Binn.* 75. *Johnson v. Chaf-sant.*

The bill of exceptions states that on the trial on the 17th *May* 1803, the defendant's counsel offered in evidence the answer of *John Browne Cutting*, prout agreement of the plaintiff's counsel, which is in these words, as it appears on the record in the form of a letter dated *May* 26, 1801, from *John Ewing* attorney for the plaintiff to *Joseph Hopkinson* attorney for defendant. "Sir, upon reflection, I think it proper to give you this early information, that *that part* of *J. B. Cutting's* answer to the bill filed in *Antigua* by Mrs. *Shippen*, which is said to be the copy of a letter from *Cutting* to *Manley*, will be objected to by me at the trial as inadmissible. The other parts of the answer may be read, subject to all legal exceptions, at the trial of *Baring v. Shippen.*" The plaintiff's counsel objected thereto, "that the said several matters and things contained in the said answer

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"were inadmissible. That the defendant at the time of giving the bond and warrant, was and still is a person learned in the *English* language, and capable of reading and understanding the same, both in writing and in print; and also that the said *ohn Browne Cutting* was not a competent witness for the purpose aforesaid, and that the said answer ought not to be admitted or given in evidence to prove the said *several matters and things* &c. But the said Justices delivered their opinion, that the said *several matters and things* so offered to be given in evidence, and proved by the defendant to maintain the said issue on her part, were proper to be given in evidence and proved on the part of the defendant, and that the said *John Browne Cutting* was a competent witness to prove the same, and ordered directed and permitted the answer of the said *John Browne Cutting* to be read to the jury. Whereupon &c."

It is obvious that besides the general objection, two specific objections are here taken to the testimony offered. The first to the nature of the testimony, on the ground that Mrs. *Shippen* was not unlettered. The second to the competency of *Cutting* as a witness, on the ground of his invalidating the bond which he had previously assigned for a valuable consideration. I think it cannot be denied that the words made use of, "the said several matters and things contained in the said answer," are sufficiently large to meet the present exception, independently of the contents of Mr. *Ewing's* letter before stated; but to that letter I can give but one construction. I read it thus. "The letter in the answer from *Cutting* to *Manley* is now expressly objected to, and you have hereby notice of it; but the other parts of the answer may be read, saving such objections as may be made thereto on the trial."

Under this letter, thus specially penned, I feel myself thoroughly at liberty to take judicial notice of what passed upon the trial, that the most perfect good faith may be preserved between the counsel. I well know the usual practice on trials, when a deposition has been ruled to be received in evidence on argument, and the adverse counsel excepts to particular parts thereof, that the court desire such counsel to note the passages excepted to, which they will decide on if

the counsel cannot agree the matters between themselves. And I have no hesitation in saying, that it was incumbent on the plaintiff's counsel here to state their exceptions *specially*, to such parts of *Cutting's* answer as they deemed objectionable. It has not even been insinuated that such part of the answer as is now objected to, was specifically excepted to upon the trial, or that the judges gave any opinion thereon. What then actually took place at the time of the trial? Mr. *John Ewing*, one of the plaintiff's counsel, states in his letter of the 17th October 1807 to Mr. *Hopkinson*, "that to the best of his recollection, the general question as to the admissibility of *Cutting's* evidence, was only discussed; but after the opinion of the court was given against the plaintiff, Mr. *Lewis* stated that certain parts of *Cutting's* answer clearly ought not to be admitted, and he thought particularly alluded to *Manley's* letter. The court after some conversation agreed to adjourn, and requested the counsel in the mean while to look over the answer together, as they might possibly agree upon the parts which were admissible. He recollected perfectly well that Mr. *Hopkinson* and himself read over the answer together in the tavern, and thought it most probable that Mr. *Lewis* and Mr. *Tilghman* were consulted upon the subject. The letter of Mr. *Manley* was cut out, either by Mr. *Hopkinson* or himself. He did not recollect any objection being afterwards made as to the admissibility of any part of the answer, which was not erased by them during the adjournment."

It cannot be denied, that the affidavits of the different counsel cannot be reconciled; though we cannot do otherwise than presume that each of the gentlemen in his affidavit speaks most conscientiously, according to the best of his knowledge, recollection and belief. Yet I am impelled to make the observation, that though both the defendant's counsel positively state, "that Mr. *Lewis* for the plaintiff and Mr. *E. Tilghman* for the defendant were present in the room after the adjournment of the court, and were occasionally consulted by the two other gentlemen who were examining the answer of *Cutting* in pursuance of the requisition of the court," in which particulars they are corroborated by the foregoing letter of Mr. *Ewing*, Mr. *Lewis* asserts, that "he is well satisfied that the examination with

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“respect to the letter, and any references thereto which might
 “be contained in the answer, took place in a great measure,
 “if not altogether, between Mr. *Ewing* and the opposite
 “counsel or one of them; and that it related to the letter
 “only, as he has always understood, except so far as it might
 “be referred to by the answer.” He further says, “that
 “after the decision of the court, he does not recollect or
 “believe that any discussion, examination or inquiry, took
 “place between him and the opposite counsel or either of
 “them, with respect to any or what part or parts of *Cutting’s*
 “answer was proper or improper to be given in evidence;
 “nor does he recollect or believe that after the decision, he
 “ever proposed to them or either of them, that any part or
 “parts of it should be struck out.” Though Mr. *Lewis* may
 neither have assented nor dissented to the proposal of the
 court in the forenoon, “to examine the deposition of *Cut-*
ting, and agree to such parts as they should mutually agree
 “upon to be admissible,” it is most certain from Mr. *Ewing’s*
 second letter, that he acquiesced therein and acted in pur-
 suance thereof. And though Mr. *Lewis* is sure and posi-
 tive, that he never did in any way or manner, consent or
 agree, either directly or indirectly, that any part or parts of
Cutting’s answer was to be considered as evidence, or that
 the bill of exceptions should be limited or confined to any
 part thereof, still both he and his client must be bound by
 the true meaning and fair construction of the letter of Mr.
Ewing the attorney upon record, of the 26th May 1801.

I consider Mr. *Ewing’s* letter of the 17th October 1807 as
 a safe ground, whereon I can form my judgment in the
 present instance. It materially agrees with the affidavits of
 the adverse counsel; and it also accords with the notes taken
 upon the trial by the late Chief Justice *Shippen*, as far as
 they go. Viewing the discussion in this light, I am con-
 strained to believe that the *general* nature of the testimony
 disclosed in *Cutting’s* answer, and his competency as a wit-
 ness, were the sole matters on which the court decided; and
 that it was submitted by them to the counsel on both sides,
 to point out and ascertain the different passages in the an-
 swer wherein they agreed, which would at once shew wherein
 they disagreed; that some parts of the answer were in con-
 sequence hereof, erased therefrom by mutual consent; that

no objections were afterwards made to other parts of the answer, but the same went to the jury as it then stood; and that the counsel on both sides made such remarks to the jury thereon as they thought proper. It follows from hence in my idea, that the plaintiff in error cannot take advantage of the objectionable parts now insisted upon, or assign them for error under all the circumstances of the case.

Upon the whole my opinion is, that the judgment of the Circuit Court for the defendant be affirmed.

The court being thus divided in opinion,

Judgment affirmed.

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DUNN and POOL *against* FRENCH.

Philadelphia,
Tuesday,
December 26.

CERTIORARI. The proceeding before the magistrate, Justices have no jurisdiction in trespass, when the damage exceeds twenty dollars; and although the summons be in debt or demand, yet if the evidence sent up shews it was in trespass, judgment for a greater sum will be reversed.

was by summons to answer a plea of debt or demand not exceeding one hundred dollars; and the judgment was for twenty-nine dollars seventy-six cents, which by the evidence sent up with the record, was rendered for the wrongful taking of the plaintiff's goods for a militia fine.

Phillips for the plaintiffs.

TILGHMAN C. J. This cause is brought before us by *certiorari*. The judgment was given by alderman *Wharton*, in an action of trespass brought by the plaintiffs against the defendant for taking their goods in execution for a militia fine. The error assigned is, that the judgment is for twenty-nine dollars and seventy-six cents damages, whereas the jurisdiction of justices and aldermen, at the time this judgment was given, 1st *August* 1806, was limited in actions of trespass to cases where the damages did not exceed twenty dollars. Upon examining the act of 1st *March* 1799, under which the alderman derived his jurisdiction, it appears that the objection is fatal. The judgment must therefore be reversed.

PER CURIAM.

Judgment reversed.

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Philadelphia,
Tuesday,
December 26.

LIPPINCOTT and ANNESLY against BARKER.

TRESPASS against the sheriff of Philadelphia county
for taking in execution the goods of the plaintiffs.

An assignment by a debtor of all his property to trustees for the benefit of such creditors as should within a given time execute a release of all demands, is good if certain of the creditors agree to accept it upon that condition, and is a transfer of the property for their use, from the time of acceptance. If therefore a *fi. fa.*, issued after the acceptance but before the execution of a release by any creditor, be levied upon the goods assigned, the sheriff is a trespasser.

Quere whether an assignment stipulating for a release, is valid upon general principles.

Upon the trial of this cause in *March 1805*, the material facts in evidence were these: In *May 1802* *William Lawrance* was appointed by the guardians of the poor, a collector of the poor tax for that year, and gave an official bond with *Joseph Bispham* and *Robert Erwin* as his sureties. In *May 1803* he was re-appointed, and with the same sureties gave a similar bond, which was filed in the office of the prothonotary of the Common Pleas on the 10th *June 1803*. In *December* following, *Lawrance* was found to be in arrear upon both duplicates; and in *March 1804* an execution was issued under a judgment on the first bond, and a stay of proceedings ordered on the 29th in consequence of some treaty between the guardians of the poor and the defendants.

On the 12th *May 1804*, *Joseph Bispham*, by an indenture of that date, reciting his inability to pay his debts, and his desire to give his creditors all the satisfaction in his power, in consideration thereof and of one dollar, assigned to the plaintiffs, with the previous assent of at least one of them who was a creditor, all his estate real and personal "in trust and to the intent and purpose that they should, as soon as reasonably might be, convert the same into money, and pay and distribute the proceeds thereof, their reasonable charges being first deducted, to and amongst all and singular the creditors of the said *Joseph Bispham*, who should within four months from the date thereof, execute a general release of all demands against him, in an equal and rateable manner, according to the amount of their respective debts, yielding the surplus if any to him the said *Joseph Bispham*, his executors," &c. The assignment was acknowledged on the morning of the 14th *May*; and *Bispham* then gave notice to his creditors, the guardians of the poor among the number, to attend a meeting on the evening of that day. All but one or two of the creditors met pursuant to the notice. *Bispham* explained the situation of his affairs, and produced the

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assignment, the terms of which were agreed to without a dissenting voice. He then immediately delivered to the plaintiffs the key of the store containing his goods, and at about eight o'clock in the evening the proceedings closed.

On the same evening the attorney for the guardians of the poor confessed a judgment in the Common Pleas against *Lawrance* and his sureties on the second bond, and about ten o'clock at night delivered a *fi. fa.* to the sheriff. The next day, as the assignees were removing the goods, the defendant made a levy and took them into his custody, shortly after which he received a formal notice of the plaintiffs' claim. On the 20th, but not before, a release conformably to the assignment was executed by most of the creditors, including the plaintiffs, and on the 23d the sheriff sold.

Upon these facts a verdict was found for the plaintiffs, for the nett amount sales and interest, subject to the opinion of the court upon the following points reserved:

1. Whether the assignment in question was fraudulent and void, or vested any property in the plaintiffs until after the levy.

2. Whether the goods in question were bound from the date of the *fi. fa.* by relation.

3. Whether by the act of 29th March 1803 the goods were bound from the filing of the second bond on the 10th June 1803.

4. Whether under the circumstances of the case trespass was maintainable.

The questions were argued at March term 1805; but the court being divided, the first and fourth points were again argued at the present term. The second and third were abandoned by the defendant's counsel, in consequence of what had previously fallen from the bench.

Sergeant and Hallowell for the plaintiffs. Since the case of *Wick v. Franklin* (a), all the objections to this assignment are reduced to the single point of the release; and under this head it is argued, first as a general principle, that the deed is void because it stipulates for a release; secondly that the operation of the deed was suspended until a release was

(a) 1 Binn. 502.

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signed by at least one creditor, which did not take place until after the execution.

The general principle gives rise to important considerations; but in application to this case the answer is easy. The clause of release was not a condition upon which the estate was to pass, but a designation of the objects who were to enjoy it. Whether the creditors would come in, depended not upon the debtor, but upon themselves; and if a presumption exists that as many would come in as the property would satisfy, then no objection lies against this more than against an assignment to particular creditors, which is sanctioned by the Chief Justice in *Wilt v. Franklin*, and by the King's Bench in *Holbird v. Anderson (a)* and in *Nunn v. Wilsmore (b)*. But the distinguishing feature of this case is, that the release was agreed to by the creditors before the delivery of the assignment. The proceedings at the meeting were a contract by the creditors, in consideration of the assignment; and if the release was even a condition, that condition was accepted. A debtor may assign to *A.* and *B.* exclusively. If *A.* and *B.* think proper to accept the assignment on the condition of a release, how does this circumstance confer an authority on other creditors to defeat it? If it does not, still less can a single creditor overthrow an assignment accepted by all the others, and which was as open to him as to them. Compositions are precisely like this kind of assignment, as to their legal effect. They are agreements by creditors to give up the remainder of a debt, upon receiving a part; and the case of *Butler v. Rhodes (c)* shews not only that they are valid, but that they are favoured, and that courts will hold creditors to their part of the agreement. But upon general principles, the release is not fraudulent. The clause has been in common use among commercial men in this state. Titles depend upon assignments of real estate which contain it. It takes the place of those provisions which in bankrupt laws or some other shape, in all countries but our own, shelter the debtor from the persecution of a rapacious creditor; and it is for the benefit of the creditor, because it induces the debtor to make an early assignment. The statutes of *Elizabeth* are not against it; they are against nothing but cheating. The spirit of the bankrupt

(a) 5 D. & E. 235.

(b) 8 D. & E. 529.

(c) 1 Esp. Rep. 236.

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laws coincides with it; they give a part to every creditor, and a discharge to the debtor. It may be argued that, the release being a condition, nothing passes to the creditors until performance, and therefore there is delay. But if the time is not too long, and it is obviously proper to allow some time for notice, the delay is not fraudulent, which it must be to defeat the deed. Every assignment must in this respect stand by itself. The delay is not under any circumstances for the benefit of the debtor; he would prefer an instant release; and as to his withdrawing his property from execution in the meantime, it is for the benefit of all the creditors, and he could produce the same effect by selling and converting into cash. So also he might produce a release from some by giving them property in full, which is all this deed can compel. The resulting trust to the debtor is of no consequence, it is no more than the law would imply; and if, as is said, it is an equity which may be taken in execution, the objection to it is still weaker. [TILGHMAN C. J. Was there any thing to shew what proportion this property bore to the debts? A debtor may assign a large sum to pay a small one, and so elude his creditors.] There is no doubt the property would not pay the debts. If fraud had been intended, certainly the assignment would be bad; but the defendant's argument is, that where none is intended, still the clause of release is a fraud in law.

That the property so vested in the plaintiff as to make the levy unlawful, can hardly be doubted. Both property and possession passed by the delivery of the assignment and the key. The trust existed, though no person was then qualified to take as *cestui que trust*; and so it is in the case of settlements upon unborn children, and in contemplation of marriage. The legal estate was conveyed to serve the use when it should arise; and in fact there was a present trust to sell. There was no condition annexed to the legal estate, but merely to the benefit of the trust afterwards; so that if no creditor came in, still the estate passed, and could not be disturbed by execution. If however the condition applied to the legal estate, it was performed by the agreement of the creditors before execution. There is no difference in equity between an agreement to do a thing, and doing it. The creditors who then assented, could not afterwards refuse the re-

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lease, and did not; if they had sued the debtor, it follows clearly from the case of *Butler v. Rhodes*, and from the opinion of the Court in *Heathcote v. Crookshanks* (a), that he might have pleaded the circumstances in bar.

The objection to the form of action has no weight. The sheriff in levying an execution, acts at his peril. He is ordered by his writ to levy on the goods of *A.*; if he levies on those of *B.*, he is a trespasser, and is liable in the same form as another. *Hallet v. Byrt* (b). There is no analogy between this, and the cases under the statutes of bankrupt, where it has been held that the sheriff is not to be made a trespasser by relation. Here the property was actually transferred at the time of levy, and he had notice of it, which does not leave him even the excuse of ignorance.

Levy and Tilghman for the defendant. The clause of release is on general principles contrary to the law of *Pennsylvania*, and fraudulent. The debtor was not entitled by law at the time of assignment to a discharge from the debt, but merely to a liberation of his person; he therefore violated the spirit of the law. He was under a moral obligation to pay his debts in full; the stipulation was therefore in collision with his duty. Such a provision then, being sanctioned neither by the law of *Pennsylvania* nor by morality, the statute should be carried as far as possible to defeat it. When the bankrupt law gives a discharge, it is after a thorough examination; but the debtor here makes himself the arbiter of his own rights, and stifles all inquiry. He in fact coerces his creditors. He, who is but a trustee of their property, says they shall not have the remnant of their own, unless they discharge him; which is as much an act of duress, as the conduct of the pawn-broker in *Astley v. Reynolds* (c). He makes the law for them, and he withdraws his property from their executions, to compel their observance of it. The delay therefore is not for the benefit of the creditors, but to obtain his discharge; for his creditors could not come in except upon this condition; and wherever the delay is intended for the benefit of the debtor, the assignment is void by the statute of *Elizabeth*. Such a clause has not been in use except since the revolution. A letter of licence was for-

(a) 2 D. & E. 27.

(b) Carth. 381.

(c) 2 Stra. 915.

merly the debtor's protection; and it is to be observed, that in the recent case of *Wilt v. Franklin*, the counsel for the assignment lay much stress upon the fact that it did not require a release. The agreement of the creditors is relied upon. That agreement was without consideration, as the assignment was previously made. Had the creditors been consulted prior to its execution, and dictated the terms, the case would have been different. But the property was already transferred, which distinguishes it from *Butler v. Rhodes*; and if it were not, still an agreement made at a meeting so suddenly called, where investigation was impossible, might be honestly and conscientiously retracted. In *Heathcote v. Crookshanks*, *Ashhurst* says, that a promise to forgive the residue of a debt in consideration of receiving a part, is *nudum pactum*, unless it is executed; and equity would never decree the execution of a contract relative to personal property under these circumstances. If it were possible that the debtor, could in some indirect way, do what he has done here, that way should be interdicted as well as this. The statute cannot receive too liberal a construction in suppression of fraud. *Cadogan v. Kennett* (a). But the thing is not possible. In no other way can he compel a release, than by conveying away his property. Where particular assignments have been supported, they have been for the benefit of the creditors, as in *Holbird v. Anderson*, and *Nunn v. Wilmore*; not for the protection of the debtor. And on the contrary where the tendency is delay, and the object and effect to screen the property, and to keep it under the debtor's control, the deed has been overthrown, as in *Burd v. Fitzsimons* (b).

It is said that the legal estate passed by the assignment, which is sufficient to defeat the execution. This is begging the question. The legal estate and the trust are inseparable; and if the latter falls from either actual or legal fraud, the legal estate falls with it. But if the estate was valid, it does not follow that the levy was wrong. The assignment did not create an immediate use to the creditors. They were to take upon the performance of a condition. In the meantime the equitable interest resulted to the assignor, and was liable to execution according to the statute of frauds, and repeated

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decisions in *Pennsylvania*. What proves to a demonstration that the equity was in *Bispham*, is the possibility that no creditor would release in four months; when it would not be any where, unless in *Bispham*. An agreement to release was not sufficient to raise the use. The debtor provided for the execution of it; and the use was to be governed by the deed, and not by a verbal understanding.

If the sheriff is answerable at all, it ought not to be in trespass. The release of the 20th May, first raised an equity in the creditors; and it is by relation only that the right is in them from the delivery of the assignment. Upon these facts, the law is settled in *Smith v. Miles* (a) that trespass does not lie; and the reason is very plain, as the sheriff would in that form of action answer in vindictive damages, for making a levy, which, at the time, it was his duty to make.

TILGHMAN C. J. In this case there are two points for decision.

1. Is the deed of assignment from *Joseph Bispham* and wife to the plaintiffs, to be considered as fraudulent and void?

2. Does an action of trespass lie against the defendant, who was sheriff of the city and county of *Philadelphia*?

The trusts of the deed (by which *Bispham* conveyed his whole estate to the plaintiffs, and which was executed when his debts exceeded the amount of his property) were that the assignees should convert the estate into money, and divide the net proceeds amongst all the creditors of *Bispham*, who should within four months of the date of the deed, execute a general release of all demands against him, in an equal and rateable manner, according to the amount of their respective debts; and pay the overplus if any to the said *Bispham* his executors or administrators.

After the decision in the case of *Wilt and Franklin* at the last March term, it must be taken for granted that this deed would have been good, if the trust had been for the equal benefit of all the creditors; but the exclusion of all those who did not execute a release in four months, makes a striking difference in the present case. It is upon this exclusion principally, that the counsel for the defendant have founded their

argument. They contend that the debtor had no right to insist on so unreasonable a condition; that at the time this debt was contracted there was no bankrupt law in force, and the insolvent law would not have entitled him to a release, but would only have exempted his person from imprisonment; besides, that no debtor ought to ask for a release, till his conduct has been thoroughly investigated, and his integrity made manifest; and that it is ill policy to suffer any kind of conveyance which leads to the stifling of all inquiry. These observations have great weight as general principles. But the question is, how far are they applicable to the case before us? The assignment was executed on *Saturday* the 12th *May*, and acknowledged on *Monday* the 14th *May*. On the same day, *Monday*, in the evening, a general meeting of the creditors was called. All but one or two met. The deed, which till then had remained in the hands of the debtor, was produced to them. They assented to it. The key of the store was immediately delivered to the assignees, who were thus put in possession of the goods. On the same night, *after those proceedings*, the guardians of the poor entered their judgment against *Bispham*, and took out an execution, by virtue of which, on the 15th *May*, the defendant levied on the goods in the possession of the plaintiffs. We perceive at once how different this case is from that of *Burd v. Fitzsimons*, relied on by the defendant's counsel, which turned on the validity of the assignment of Mr. *McGlenachan*. There the deed was executed on the 2d *September*, and no meeting of the creditors was called till the 15th *December*, above twenty days after the execution of *Burd* had been levied on the land which was the subject of dispute.

It has been conceded by the defendant's counsel, that *Bispham's* deed would have been good if the creditors had been consulted *before* its execution. Nay more, it has been conceded that if any of the creditors had given a release before the execution of the guardians of the poor was levied, such creditors would have been entitled to a preference. I confess I can see no good reason why the creditors should not be entitled to the benefit of the deed, from the time they agreed to accept it. It is objected that they were not bound by their agreement, and that a court of equity would not have compelled a specific execution of it. If the creditors had been in

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any manner deceived, they would have been under no obligation to stand to the agreement. But if they were fairly informed of the debtor's circumstances, and no imposition practised on them, it appears to me they were under a moral obligation to perform their part of the bargain. But the fact is that they never wished to retract; and on the 20th *May*, the release was executed. When they themselves then considered the contract as binding, and actually proceeded to execute it in a few days, why should a third person be permitted to say, that they should have no advantage of the assignment, because they were not bound by it? The case of *Butler v. Rhodes*, 1 *Esp. Rep.* 236, has a strong bearing on the present question. There, one of the creditors who had verbally agreed to a composition, in consequence of which his debtor had made an assignment of all his estate, was not permitted to relinquish the composition, and support an action for his debt. There is strong reason why the law should be so. If a particular creditor could abandon the assignment, and resort to his action, he would gain an unfair advantage of the other creditors, who refrained from suits on the faith of an agreement in which all had concurred. These considerations induce me to be of opinion, that those creditors who assented to the assignment on the night of the 14th *May*, are entitled to the benefit of it from that time. There is no occasion to decide whether others are entitled to the same benefit, because I understand that the debts of those who so assented, are more than sufficient to absorb the whole estate. I beg however to be distinctly understood, that my opinion is confined to the circumstances of the *present case*; for there are *many and strong* objections to deeds of assignment, made without the privity of creditors, and excluding all who do not execute releases.

As to the second point, whether the sheriff is liable to an action of trespass, there is no difficulty. The case cited from *Carth.* 381. contains my Lord *Holt's* opinion expressly on the point. He says that in writs of execution, the command of the writ being to levy on the goods of the defendant, the officer acts at his peril, and is liable to an action of trespass if he takes the goods of *another person*. The argument of the defendant's counsel was founded on a supposition, that

nothing passed by the deed of assignment until the 20th *May*, when the creditors signed a release; and that the sheriff ought not to be made a trespasser by relation. But the deed took effect at law immediately on its execution, and in equity at least from the night of the 14th *May*, when the creditors assented to it, and the key of the store was delivered to the assignees; and this was prior to the entering of the judgment of the guardians of the poor. My opinion is that judgment be entered for the plaintiffs.

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YEATES J. This case was tried at Nisi Prius in *Philadelphia* on the 1st *March* 1805, when a verdict was given for the plaintiffs for 1412 dollars 49 cents, the nett amount of the sheriff's sales and interest, subject to the court's opinion on certain points reserved. Those points were fully argued before the court in *March* 1805; but the members of the court having been equally divided, no judgment was given.

They have undergone another argument this term. The first point reserved on the trial was, whether under the circumstances of this case, the assignment of *Joseph Bispham*, dated 12th *May* 1804, was valid, so as to vest the property in the assignees, or was defective, fraudulent and void?

The objections made to the assignment on the part of the defendant, have been much narrowed since the former argument. Some grounds were then insisted on, which the decision of a majority of this court in (a) *Wilt v. Franklin* assignee of *Keely*, and *Berthon and Son v. Keely*, at the last *March* term, have induced the counsel now to relinquish. It was determined in these cases, that a general assignment, made by an insolvent person to certain persons not previously nominated by his creditors, of all his property real and personal, in trust to distribute the moneys arising therefrom to and among *all* his creditors rateably in proportion to their respective debts, might be good and valid, though executed with the professed intention of defeating an execution meditated to be taken out by a particular creditor; and also, that a schedule of debtors and creditors not accompanying the assignment, did not render the same invalid. I shall there-

(a) 1 *Binn.* 513. 518.

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fore wholly omit any observations on those grounds of objection.

It has been urged by the defendant's counsel, that by reason of the proceeds being stipulated to be paid to the creditors who should within four months execute a general release of all demands against *Bispham*, the vesting of the property was suspended until the 20th *May*, on which day the creditors executed a formal release to him; that the goods were bound by delivery of the execution at the suit of the guardians of the poor upon the judgment entered against *Bispham* on the second bond, a few minutes after 10 o'clock of the night of the 14th of *May*; and that under all the circumstances, the deed of trust was fraudulent and void, within the statute of 13 *Eliz. c. 5.* "by delaying and hindering the "creditors."

In order to form a correct judgment on this part of the case, we must attend minutely to the facts and events as they occurred.

The assignment was executed by *Bispham* and his wife in the presence of witnesses, on *Saturday* the 12th *May* 1804, none of his creditors being present, that we know of. Nothing happened on *Sunday*; but upon *Monday* the 14th *May* a general notice was given to *all* the creditors of *Bispham*, including the guardians of the poor and *Robert Erwin* his co-surety, to meet at an appointed place. It appeared that *all* his creditors attended in pursuance of the notice, except one or two at most; and that he then represented to them the situation of his affairs, and offered to them the assignment, which was acknowledged before the late Chief Justice *Shippen*; one if not both of the trustees, having previously agreed with him, to accept the intended trust. They all expressed their full consent to the terms proposed; and *Bispham* in pursuance thereof, delivered to the assignees the assignment and key of his store, the whole business having been transacted and completely closed, about 8 o'clock on the evening of that day. The possession of the goods was in the assignees, above two hours before the adverse writ of *fieri facias* was in the hands of the sheriff. I see no solid reason, why the equitable as well as legal interest in the goods in question, did not vest in the trustees, prior to the entry of the judgment and taking out the execution. The

creditors who generally met, were bound by their assent to the terms of the assignment, and could not retract therefrom on any legal, moral, or honourable principle. In *Jolly et al. assignees of Norton v. Wallis* (a), where a composition deed was entered into by an insolvent debtor, with a clause that if certain creditors did not sign the deed, it should be null and void, it was resolved, that if such creditors accepted of the composition, or the security for the composition, though they did not actually sign the instrument, it was nevertheless valid and good. Lord *Kenyon* there said, he should hold, that they acquiesced in the composition, and consented to come in under it, and that they should be bound thereby.

On the good faith of the creditors, the goods in the store were actually delivered to the trustees, as their agents, and put beyond the power and control of *Bispham*. No future election was left to them, which could be resembled to *Alderson et al. v. Temple* (b). So far has this matter been carried, that an assignment by a trader, while resident in *India*, of all his effects, in trust for creditors in certain proportions, has been held not fraudulent and void in itself, being intended honestly at the time, and assented to by the generality of the creditors. *Ingliss et al. v. Grant* (c).

It has been further urged, that this assignment, confining the distribution of the proceeds to such of the creditors as should execute a general release of all demands against the debtor within four months, was fraudulent, inasmuch as it prescribed hard and unreasonable terms, and was a species of coercion on the creditors. This matter was slightly touched, upon the first argument. But it is now said, that a man is under a moral obligation to do justice to his creditors when he has it in his power, notwithstanding any release; and that the insolvent law only liberating the person of the debtor from imprisonment, he has no right to an exemption of his future property, though he surrenders up all his estate. We must be contented to take the world as we find it. I regret that we find such few instances of refined virtue, in the payment of debts. It will be remembered however, that we

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(a) 5 Esp. 228. see 1 Esp. 236. 2 T. R. 24.

(b) 4 Burr. 2235. 2241.

(c) 5 T. R. 530.

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are now inquiring whether the assignment on the face of it, or from extraneous circumstances, was a fraud on the interests of the creditors. They certainly were competent to judge of the proposals made to them, and should be bound by their own acts. Independently of the bankrupt laws, a debtor may (a) prefer one set of creditors to another, and such a measure would be neither illegal nor immoral. Contracts made during the existence of the bankrupt acts, must be supposed to have in view their provisions. In the case before the court, the plain object disclosed in the deed, was to put all the creditors on one common footing, without predilection or prejudice to any one creditor. On this broad basis of perfect equality, rests the whole system of the bankrupt laws. The debtor here desires no further benefit or advantage from his assignment, than he would legally have been entitled to, if those laws had been in operation. Under the 36th section of the bankrupt law of the *United States*, passed 4th April 1800, (b) the bankrupt who has made a full discovery of his estate and effects, and in all things conformed himself to the direction of the act, upon two thirds of the creditors in number and in value testifying their consent, is entitled to a certificate of discharge from the judge of the district, which liberates both his person and property from preexisting debts which might have been proved under the commission. The creditors here performed the functions of commissioners of bankrupt, and have closed with the proffered terms. The conclusion which I draw on the whole matter, that the assignment is valid under all the circumstances of the case so as to vest the property in the assignees, I trust, will not in any degree impair commercial credit, or fair dealing. Could I suppose, that such would be the probable pernicious consequences of my decision, I would pause a long time, before I could be induced to make up my mind on this occasion.

I deem it proper to express my sentiments on the other points reserved on the trial, although only the last point has been insisted upon in the last argument. Upon the second and third points, the former members of this court entertained the same opinion.

The second point is, whether the execution of the guar-

(a) 5 T. R. 424. 8 T. R. 528. *Proc. Cha.* 105. (b) 5 U. States Laws 70.

dians of the poor bound the goods from the *teste*, against this assignment? This depends on the true construction of the act of 21st March 1772 (a). The 5th section thereof directs that "no writ of *feri facias*, or other writ of execution, shall bind the property of the goods of the person, against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff &c. to be executed." This is copied *verbatim* from the 17th section of the *British* act of frauds and perjuries (b) 29 Car. 2, c. 31*. It is objected that this act, has always been confined to *purchasers*; and does not apply as between the parties, by the *English* decisions; and therefore considering this assignment, if valid, as a mere voluntary deed, the goods intended to be transferred thereby, will be bound by *relation* from the *teste* of the writ. But it will be remembered, that upon the third section of our law, copied from the 15th section of the same *British* statute, which contains stronger words than that under consideration, this court were of opinion, in a case stated between *Joseph Welch* and *Archibald Murray* in the term of March 1805, that as between mere judgment creditors, their respective judgments bound from the times of entry, and not from the last day of the preceding term. A case in *Prec. Cha.* 478 was then cited by the court, to warrant the practice which had uniformly prevailed in *Pennsylvania*. I do not say that judgment creditors are to be considered as *purchasers*. I well know that it has been determined otherwise both in *England* and here. But are not trustees, who claim under a deed expressly made to secure the honest antecedent debts of fair creditors, though a small money consideration is inserted therein to make it more formal and effectual, better entitled to the appellation of *purchasers*? Can the present deed be correctly considered as merely voluntary? I cannot think that a *fiction* of law should invalidate the operation of such a deed.

The third point is, whether by our law of the 29th March 1803, section 7, (c) these goods were bound from the time of filing the bond? This must rest on the true meaning of that

(a) 1 St. Laws 641.

(b) 3 Ruff. Stat. 386.

(c) 5 St. Laws 514.

* Except that the words "of the person" are omitted by mistake in the *English* statute.

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law. It declares in what manner the bonds of the collectors shall be given and filed in the prothonotary's office, and then proceeds to declare, that "they shall be and operate from the time of filing the same, as a *judgment* or *judgments* upon the lands, tenements, *goods*, *chattels* and *effects* of the said collectors and their sureties, until the final settlement and discharge of the said collectors, for or on account of their duplicates."

The effect of filing the bond is to make it equivalent to a judgment, as to its operation on lands and goods; but it goes no further. Now it is well known, that a judgment does not bind goods; until the delivery of an execution thereon to the sheriff; and consequently, the filing of the bond cannot outstrip the effect of a judgment. Should a different construction of this section be adopted, no man who is a collector of poor tax in the city, nor his sureties, could sell any part of their personal property, until the duplicate was finally discharged, without bringing the purchasers into jeopardy at a future day, which never could be the intention of the act.

The remaining point is whether trespass will lie by the plaintiffs against the sheriff, for taking the goods in execution at the suit of the guardians of the poor. In my idea it depends upon the consideration, whether the trust was in legal operation, at the time when the goods were levied upon. To subject a sheriff to an action of trespass, the taking must be unlawful; and persons who act *innocently* at the time, are not made *criminal by relation*, and therefore are excused from being punishable as trespassers (a). If the sheriff seizes and sells the goods, before he has notice of an act of bankruptcy of the defendant, he is excused (b). If he sells them after such notice, though he may be sued in trover, he is not liable in trespass. But having satisfied my own mind, and declared my opinion, that the deed of assignment was valid to pass the property of the goods to the plaintiffs, previous to the fieri of the execution attaching, if I am correct on that head, the consequence must be, that the taking was *unlawful*, and the present form of action maintainable.

(a) 1 Burr. 20. 1 Bla. Rep. 65. 1 T. R. 475.

(b) 1 Bla. Rep. 205. 2 Bla. Rep. 829.

On the whole, I am of opinion with the plaintiffs upon all the points reserved on the trial, and that judgment should be rendered for them in this suit.

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BRACKENRIDGE J. Since the argument by counsel, I have cast my eye upon a case, *Brady v. Shiel administratrix*, tried at Nisi Prius before the Chief Justice of the Common Pleas in *England*, and reported *Campbell* 147. The administratrix finding the effects of the deceased, her husband, insufficient to pay all his creditors fully, had called a meeting and proposed a rateable distribution, to which they at first unanimously assented. A deed of assignment with covenants to sue &c., was accordingly prepared; but upon some dispute respecting who should be the trustees, the plaintiff refused to come in under it, though he declared he should give no further trouble. The deed was afterwards executed by the administratrix, and all the creditors with the exception of the plaintiff. Under the deed, a ship, the only assets that had come to the hands of the administratrix, passed to trustees for the benefit of the trust. It was contended that the action could not be maintained, after the administratrix, in consequence of the plaintiff's assent, had parted with all the assets that were come to hand, and the other creditors had been induced to execute the deed, and accept of a composition. The Chief Justice seemed to think that this, if made out by evidence, would be a defence. He wished it were more generally known, for he believed that lawyers in the court of King's Bench were not aware it, that through the medium of a court of equity, the creditors of a *deceased* insolvent may always be compelled to take an equal distribution of assets. It was only for a friendly bill to be filed against the executor or administrator to account, after which the chancellor would enjoin any of the creditors from proceeding at law. In a note the reporter cites 4 *East* 10, where in answer to an observation from the bar, *Lawrence* Justice said, why may not a plea state that the testator was indebted to *A. B.* and *C.* in so much respectively, and that a judgment was acknowledged in trust to secure all their debts?

I will acknowledge I was not aware a court of chancery would have gone so far in *England*. But I presume it would only be where the debts were in equal degree, and had no

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preference one over the other, and only in the case of a *deceased* insolvent, where the personal responsibility was gone, and the effects could not be increased or diminished by himself, that he would so compel. What would the chancellor do, or what plea would the law allow, where the insolvent himself, having in view an equal distribution, wishes to exclude a judgment from the unequal attachment of his effects? Admit that a debtor may prefer a particular creditor, may give him property in satisfaction of the debt; but the goods must not exceed the value of the debt, or must bear a reasonable proportion to the debt to be satisfied. The transfer also must be absolute, the delivery immediate. The continuance in possession is a badge of fraud.

Suppose an absent creditor whom the debtor wishes to prefer. The delivery of goods to a trustee for his use, must, I should think; be complete absolute and unconditional. Where the trust cannot but be for his benefit, and where it cannot but be, but that he will consent, his consent may be presumed. But if a condition is annexed, that he shall take the property transferred in full satisfaction of a debt, to which the property may not be equal, it does not necessarily follow that he will accept, and therefore the law cannot presume it, so as to couple even his subsequent assent with the delivery of the property. But if time is given until he returns and makes his mind known, is another creditor bound to wait the result? In what state is the property in the meantime, and how long may it remain in that state? Some of the creditors in the case before us, did previously agree to *release*, and some afterwards agreed; but all did not agree, more especially the judgment creditor. It could not be reasonably expected that he would agree. Under the trust in the case before us, the property delivered, as soon as *reasonably convenient*, is to be made into money, and the proceeds to be distributed; but *yielding the surplus* if any to the debtor himself. If it had been yielding the surplus if any to *the trustees* for the benefit of creditors who might come in under this commission, it might have removed one objection, which of itself I hold fatal. It may be said it is the same thing to the dissenting creditor, as he can levy on the surplus in the hands of the debtor, after it has been yielded to him. Could the sheriff return money levied? Is it to be pre-

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sumed that he would ever see it, much less that it would ever come to his hands? It would seem to me that if a disposition of effects under such circumstances as in the present case was allowable, we would have cases more perfectly analogous from the *English* reports, than any that have yet been produced. It would seem to me that nothing so far has been attempted, and that it has been left to the *astutia Americana* of debtors, to devise such a warehousing of effects out of the hands of the law for a time, for the benefit of particular creditors. I think it to the let and hindrance of creditors, and that such disposition is void both at common law and by statute; though not fraudulent in fact in the particular case, yet fraudulent in law, and therefore void. It is not simply the surrender of his property as satisfaction *pro rata* of his debts, that the insolvent here has in view. He couples an interest for himself in obtaining a discharge from that proportion of the respective debts which may remain unsatisfied. It is taking an undue advantage of the situation of a creditor, to impose this condition. It is immoral to exact it. *Volenti non fit injuria* if the creditor accepts, but it is making a volunteer by compulsion, and is in fact a robbery. One enlightened on the principles of moral honesty would never think of it. He would give what he had to one or more or to the whole of his creditors; but he would never think of annexing a condition precedent or subsequent to such surrender. Of such conditions a chancellor would not compel a fulfilment. I can think of nothing either morally honest or strictly legal, but the indefinite unconditional surrender of the property. Pass this boundary, and I can draw no line where an assignment shall be supported and where not. Every case must be *ad arbitrium judicis*, without principle to guide; and he must decide according to his own feeling of what is humane, or hard and uncharitable, in the case.

As to the form of the action of trespass, I have no doubt but that it is supportable. But on the ground of the assignment being in my opinion not to be supported, I am of opinion that the judgment be for the defendant.

Judgment for plaintiffs.

1800.

Philadelphia,
Tuesday,
December 26.

LIVEZEY and another against GORGAS and others.

An assize of nuisance commenced in the Common Pleas, may be removed by *certiorari* to the Supreme Court, the judges of which have jurisdiction as justices of assize, and may if necessary resummon the same jury, who viewed the nuisance by command of the court below.

CERTIORARI by the defendants to the Common Pleas of Philadelphia county, to remove the record in an assize of nuisance.

Lewis for the plaintiffs moved to quash the *certiorari*, upon the ground that the cause had been removed before the assize was taken, and that this court was not competent to take it. He said it was an undeniable rule, that if the superior court is not competent to try the cause, *certiorari* does not lie; *Skinn.* 420. *The King v. Wakefield (a)*; and he contended that this court was defective in jurisdiction, both from the nature of the remedy, and the want of a competent jury. An assize is *festinum remedium*; it is to be taken only by the recognitors who had a view before the return of the writ; they are arraigned on the day the writ is returnable; the demandant is then to count, and the tenant to plead *instantly*; and it is only *ex gratia curie*, that there can be an adjournment to the next day. *Plowd.* 89. *Savies v. Lenthal (b)*, *Saveris v. Briggs (c)*. It is moreover to be taken in the proper county; and so far from there being an instance in which it has been removed to another court for trial, that it cannot, except by the *Stat. Westm.* 2. c. 3. be adjourned even into bank for difficulty, unless the jurors have given a verdict. 1 *Bac. Abr.* 251. *Assize A. Fitz. N. B.* 409. All these provisions are essential to the character of the remedy, and they are completely disappointed by removal. But how is this court to get a proper jury? The recognitors are discharged, none else can try the cause, and there is no process by which they can be brought up. The act of 22d May 1722 should not be deemed to give the court jurisdiction, when such difficulties result from it. They are authorized it is true to issue *certioraris* as often as occasion may require; but occasion does not require it, if they cannot try the cause; or at least it does not require it before the assize is taken. They may perhaps issue it afterwards; and as the verdict in

(a) 1 *Burr.* 489.

(b) 3 *Mod.* 273.

(c) *Salk.* 82.

assize is never general, but all the facts are found, they will then have an opportunity of forming their opinion upon the law. *Plowd.* 91.

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Rawle for the defendants, argued that by the act of 1722 the judges of this court are justices of assize, as they have the jurisdiction of both the King's Bench and Common Pleas; that they are authorized to issue writs of *certiorari* as often as occasion shall require; and to remove and try all manner of pleas and complaints from inferior courts. This general power includes the particular case, unless the exercise of it is in some way repugnant to the remedy. But it is not. The proceedings are not essentially so prompt as is supposed. Instead of arraiguing the assize on the return day, the recognitors may in *England* be adjourned into the Common Pleas, and the assize taken there; 3 *Bl. Comm.* 58; and if the writ is returned into the King's Bench or Common Pleas, it *must* be adjourned into the proper county for trial. So if the issue is joined on any collateral matter, and not on the very point of the assize, or if foreign matter is pleaded, then the issue is tried *in modum juratae*, that is by a common inquest, either in the same or a foreign county, and in the meantime the assize is adjourned. 8 *Bl. Comm.* 403. *Booth* 212, 213. *Co. Ent.* 61. *Bro. Abr.* 120. *pl.* 13, 14, 16. 21. 24. The delay which is incident to a removal, is likewise to an adjournment; and the record comes to this court by the one, precisely as it would go into bank by the other. The reason why there are no precedents of removal in *England*, is because they do not use the writ of *certiorari* to remove causes for trial as we do; it is however said by *Brooke*, that *certiorari* lies to remove an assize. *Bro. Abr. Certiorari pl.* 18. The only question then is, whether the recognitors after being discharged below, may be resummoned; and of this there can be no doubt. They may be resummoned even after the assize is taken, if it has not been taken correctly; *Fitz. N. B.* 421. 423. *Booth* 289; *a fortiori* where it has not been taken at all. All that is necessary, is that at least two of those who had the view, should be upon the jury; and this court is able to resummon the whole.

1809. *Lewis* in reply observed that the authority from *Brooke* was founded on *Fitzherbert's Natura Brevium*, where it appeared to be a removal after verdict and judgment; and that all the cases of resummons were by the same court.

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TILGHMAN C. J. delivered the opinion of the court.

This is an assize of nuisance commenced in the Court of Common Pleas, and removed to this court by the defendant by *certiorari*. The plaintiff has moved to quash the *certiorari* as having issued irregularly.

The learned counsel for the plaintiff has thought fit to elect a remedy which has long been antiquated in *England*, and which, if ever pursued in this state, has certainly not been used more than once or twice; indeed no precedent has been shewn of its having ever been carried completely through. Lord *Mansfield* declared, that of *seisin* and *disseisin* very little was known except the name. I will not say quite so much of the assize of nuisance, but it is certainly a subject in which we are much in the dark. It is however our duty to administer justice to suitors, in whatever legal form they may think proper to present their claims. It cannot be denied that the remedy by assize exists, because it is expressly declared in the act of assembly 22d May 1722, that the Judges of the Supreme Court shall have jurisdiction as *justices of assize*. The counsel for the plaintiff founds his motion on the supposition, that if this court retain the suit, they cannot go on to try it, because the jury who viewed the nuisance while the cause was depending in the Common Pleas, have been discharged, and no other jury can decide it. It appears from the precedents which have been cited, that the recognitors of assize who had the view, and were originally returned by the sheriff, are those by whom the assize is to be taken; but it also appears that in many instances they have been discharged, and afterwards resummoned. It was said by the plaintiff's counsel that such resummons was always by the same court in which the suit was commenced. It probably is so in *England*, because there it is not the custom to remove a cause from the Common Pleas to the King's Bench for trial; but here it is different. What was the effect of the *certiorari* in this case? It prevented the Court of Common

Pleas from any further proceeding, and brought up the record. On its entrance into this court, every thing stood exactly as it was in the Common Pleas, at the time of removal. If then the law be, as is supposed by the plaintiff, that the same jury who viewed the nuisance must try the assize, the court are of opinion that they have power to resummon them.

This being the only objection raised by the counsel for the plaintiff, the motion to quash the writ must be rejected.

Mr. *Lewis* took nothing by his motion.

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MANN against ALBERTI.

Philadelphia,
Tuesday,
December 26.

IN this cause a judgment for a sum exceeding sixty dollars, was rendered against the defendant by an alderman of the city on the 22d *July* 1805; and after the expiration of twenty days, but before execution had issued, the defendant offered to enter special bail, to obtain a stay of execution for nine months, agreeable to the 9th section of the act of 28th *March* 1804, 5 *St. Laws* 390. The alderman refused to take the bail, and on the 1st *November* 1805, issued execution.

The record being then removed to this court by *certiorari*, the defendant filed an exception to the execution. He afterwards gave notice of his intention to submit it to arbitration under the act of 29th *March* 1809, 9 *St. Laws* 125, to which the plaintiff objected; and it was now agreed to discuss together the validity of the exception, and the defendant's right to the arbitration.

Franklin (attorney general) for the plaintiff, contended that the provisions of the arbitration law embraced exclusively questions of fact, which had not undergone a trial; and that all its details negatived the arbitration of a point of law, which had already been decided by the magistrate. Upon the exception to the execution, he said, that although no time

After a cause has been once decided either by a jury, a justice of the peace, or by referees, and is remaining in court for decision on a matter of law, it is not in the power of either party to submit it to arbitration under the act of 29th *March* 1809.

The defendant in a suit before a justice of the peace, is entitled to enter special bail, to obtain a stay of execution, after the twenty days allowed for an appeal have expired; provided an execution has not already issued.

1899. was expressly limited by the act, for the entering of special
 MAWV bail, yet as only twenty days were allowed for an appeal, at
 v. the expiration of which an execution might issue, it was the
 ALBERTI. defendant's duty at all events to enter it within that time; indeed from the case of *Calvert v. Pitt* (a) he was bound to enter it *instantly* upon the rendering of the judgment.

Levy for the defendant, relied upon the comprehensive words in the first section of the arbitration law, that it should be lawful "for either party in all civil actions or suits, to "enter a rule of reference," &c. without qualification either as to the character of the question involved, or the situation of the suit; and as the legislature had conferred upon the arbitrators the power to decide law as well as fact, there was no legal absurdity in referring a point of law. On the exception, he argued, that as there was no limitation of time, it became necessary to resort to the reason of the thing. The stay of execution was intended for the benefit of the defendant, the special bail for the security of the plaintiff. If the plaintiff obtained the bail before execution, his security was the same as if it had been entered within twenty days; and if the defendant did not obtain the stay, he was deprived of a privilege which the law intended; although allowing it to him would not injure the plaintiff. *Calvert v. Pitt* arose under another law, and the principle relied upon was merely a *dictum* of the Chief Justice.

TILGHMAN C. J. This cause was originally determined by alderman *Wharton*, and removed to this court by *certiorari*. The defendant here filed exceptions, and the cause having stood some time on the argument list, he entered a rule of reference under the act supplementary to an act entitled an act to regulate arbitrations and proceedings in courts of justice. The plaintiff objects to this rule, and we are called upon to decide, whether it was regularly entered.

The defendant relies on the first section of the act, in which it is said, that "it shall be lawful for either party "plaintiff or defendant, or their lawful attorney, in all civil

(a) 1 *Dall.* 406.

"actions or suits brought or to be brought in any court of this commonwealth, to enter at the prothonotary's office a rule of reference," &c.

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ALBERTI.

Upon an attentive consideration of the whole act, I am clearly of opinion that it was not the intention of the legislature to give either party the power without consent of the other, to take a cause out of court, and submit it to arbitrators, after it had been once decided either by a jury or referees, or a justice of peace or alderman, and was remaining in this court for decision on a matter of law. The arbitrators are sworn "*justly and equitably* to try all matters in variance submitted to them;" and they have power to decide the law and the facts that may be involved in the cause submitted to them." All the details of the act are founded on the supposition that there were facts to be decided. In order therefore to comply with the general spirit and intention of it, the generality of the expressions in the first section must be restrained to cases where a trial had not already taken place.

This point being disposed of, I proceed to consider the defendant's objections to the proceedings before the alderman.

Judgment was entered for the plaintiff 22d July 1805. Sometime in the month of *August* following, more than twenty days after the judgment, the defendant appeared before the alderman, and offered to enter special bail. The sufficiency of the bail was not objected to, but the alderman refused to take it, because more than twenty days had elapsed from the date of the judgment. An execution was issued November 1, 1805, and the defendant excepts to it as having been illegally issued. This is the only point to be decided. It depends on the act commonly called the hundred dollar act, passed 28th *March* 1804. By the fourth section, twenty days after judgment are given for either party to appeal. By the ninth section it is declared that "in all cases where the defendant is a freeholder, or shall enter special bail to the action, and the judgment shall be above five dollars thirty-three cents and not exceeding twenty dollars, there shall be a stay of execution for three months; and where the judgment shall be above twenty dollars, and not exceeding sixty dollars, there shall be a stay of execution for six

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"months; and where the judgment shall be above sixty dollars, and not exceeding a hundred dollars, there shall be a stay of execution for nine months."

The stay of execution was intended solely for the benefit of the defendant; and it is not said within what time the bail shall be entered. But as no more than twenty days are allowed for entering an appeal, there is nothing to prevent the plaintiff from taking out execution, if the bail is not entered within twenty days. In the case before us, the plaintiff did not apply for an execution at the end of the twenty days, and before he did apply, the defendant offered good bail, which was refused. If the bail had been taken when offered, the plaintiff would have derived as much benefit from it, as if it had been entered within twenty days. I can see nothing in the act which prevents the entry of bail after twenty days; if an execution has not been taken out; and without an express provision for that purpose, I think the defendant ought not to be deprived of the stay of execution.

I am therefore of opinion that the alderman acted improperly in refusing the bail, and issuing an execution. It follows that the execution must be set aside. The judgment must be affirmed, no objection having been made to it.

YEATES J. I fully subscribe to all that the Chief Justice has said about this case not being within the arbitration act; but differ from him on the other point. Under what is called the forty shilling act, passed 28th May 1715, 1 *St. Laws* 113, the judgment of the justice of the peace is conclusive to both parties without further appeal, and execution if required is immediately awarded against the defendant. The five pound act, passed 1st March 1745, (*Id.* 304) directs, that in debts between forty shillings and five pounds no execution shall be issued against a freeholder in less than three months after judgment, unless it be verified by affidavit, that there is danger of losing the debt by such delay; and when the defendant is not a freeholder, the execution against him shall be respited for the like term of three months, on his entering into recognisance with one sufficient surety in the nature of special bail, conditioned to deliver the body of the defendant to the sheriff, or to pay the debt adjudged. The act also gives an appeal to either party, ex-

cept on the report of auditors, within six days after the judgment rendered, but not after, upon giving the security prescribed by the law. Under this law, it has been decided in this court in *Calvert v. Pitt* in 1789 (1 *Dal.* 406), that the defendant after judgment given against him by a justice, ought to enter into a recognisance *instantly* with at least one good surety: but he may afterwards withdraw his security, or appeal to the Common Pleas within the six days allowed by the act.

The twenty pound act passed 19th *April* 1794 (3 *St. Laws* 536) stays execution when the debt is above five pounds and not exceeding ten pounds, for six months from the date of the judgment, if the defendant is a freeholder, or enters special bail; and where the debt is above ten pounds and not exceeding twenty pounds, execution is stayed for nine months in the case of a freeholder, or entry of special bail.

The decision of this case rests on the true construction of the hundred dollar act passed 28th *March* 1804, (6 *St. Laws* 383) which was made perpetual with a few alterations, by an act passed 9th *April* 1807, repealing former laws on the subject (8 *St. Laws* 78).

The third section directs that where the debt does not exceed five dollars thirty-three cents, the judgment of the justice shall be final; if referees are chosen, and judgment be rendered on their report for a sum not exceeding fifty-three dollars, it shall also be final. Under section fourth, where either party refuses to refer, the justice shall decide, "either party having the right to appeal within twenty days after judgment being given." The seventh section directs, that where judgment is given by default, "twenty days shall be allowed for an appeal, before any further proceedings are had." And by the ninth section, stay of execution is directed in particular enumerated cases, where the defendant is a freeholder, or gives special bail. If the debt is above sixty dollars and does not exceed one hundred, a stay of execution of nine months is allowed.

It has been urged by the defendant's counsel, that *George Boots* offered to alderman *Wharton* to become security for the debt, in the nature of special bail, after the expiration of the twenty days, and was refused; and that the law fixing no

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time for the entry of the special bail, in order to stay the execution, a defendant is entitled to enter it any time within the nine months, provided the plaintiff has not issued his execution.

This appears to me contrary to the general spirit of the act under consideration, and opposed to the principle of the resolution of this court in *Calvert v. Pitt* before cited. I have endeavoured to inform myself on this subject since the argument; and from what I have been able to collect, I have reason to believe that the construction generally received and acted upon by the justices of the peace, is directly opposed to the position of the defendant. The period of twenty days is allowed for an appeal, and no further proceedings can be had on a judgment by default till that time is expired. It appears to me that within this interval it is incumbent upon him to determine on the measures which he means to pursue. He may either enter his appeal, or, if he is no freeholder, may give special bail to stay execution according to the terms of the act, during that space of time; but I think he ought not to be permitted to take either step afterwards. If he should receive such permission, though he might be possessed of goods and effects more than sufficient to pay the debt, the creditor would be thereby prevented from suing out execution, till the end of the time prescribed; and the debtor might afterwards surrender himself to gaol in discharge of his bail, and thus defeat his creditor from the recovery of a just demand. I am of opinion the judgment should be affirmed *in toto*.

BRACKENRIDGE J. concurred with the Chief Justice.

Judgment affirmed and execution set aside.

PASSMORE *against* MOTT.DUNCAN *against* Same.

1809.

Philadelphia,
Tuesday,
December 26.

THESE causes were brought before the court by *certiorari* to an alderman of the city, and depended upon the same principle.

By the evidence which accompanied the alderman's return, the defendant was sued in each case for the price of a ticket in the Easton Delaware Bridge Lottery, which he had signed as secretary to the corporation of the Easton Delaware Bridge Company, purporting in the usual form, that the bearer would be entitled to the prize drawn to the number of the ticket, if demanded in one year. Whether the tickets were drawn prize or blank, did not appear; but it was understood that the actions were brought to recover back the price of the tickets, upon an allegation that the lottery had not been fairly drawn. Of this however there was no evidence on the return, the alderman having given judgment merely upon proof of the defendant's handwriting.

The proceedings were defective in many particulars; but it was agreed by *Phillips*, *Hopkinson*, and *Ingersoll* for the defendant, to submit the cases without argument, upon the single objection that the defendant was not personally answerable; for which they cited *Jones v. Le Tomb (a)* and *Macbeath v. Haldimand (b)*.

Franklin (attorney general) for the plaintiff.

TILGHMAN C. J. after stating the case, delivered judgment.

The question in these causes is, whether the defendant, acting as secretary to an incorporated company, and signing his name as secretary, is responsible personally to the plaintiffs. It would be extremely hard if he were so responsible, because the contract was expressly made by him on behalf of the company; nor is there the least reason to suppose that the plaintiffs trusted to his individual credit. The law has

(a) 3 Dall. 384.

(b) 1 D. & E. 172.

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been long settled in cases similar to the present. In *Macbeath v. Haldimand*, it was decided that general *Haldimand* was not responsible for contracts made by him in *Canada*, on behalf of the *British* government; and in *Jones v. Le Tomb*, it was determined, without hearing the argument of the defendant's counsel, that he was not answerable for bills of exchange drawn by him in the *United States*, as consul general for *France*, on the *French* government, payable in *Paris*, and which were protested for non-payment.

The court are therefore of opinion that the judgment in each of these causes be reversed.

Judgment reversed.

Philadelphia,
Tuesday,
 December 26.

TIFFIN against TIFFIN.

THE plaintiff and defendant were divorced *a mensa et thoro* at *December* term 1802; and in *September* following, this court, pursuant to an agreement between the parties, decreed that the defendant should pay to the wife three hundred dollars per annum in equal monthly payments, transfer to her some personal property, and execute a conveyance to trustees for her use, of an estate in *New Jersey* worth about twelve thousand dollars, which she had brought him in marriage; the whole to be in full of all claim of alimony and dower. And in case the payments should be delayed three weeks after the time appointed, an attachment might issue to enforce the decree, without the necessity of applying to the court.

24. Whether the court would revive the order, and compel the payment of arrears, if after such a reconciliation the wife was turned out of doors by the husband, or compelled by his treatment to withdraw.

The transfers and conveyance were duly made; but upon the affidavit of the wife on the 12th *January* 1807, that three hundred and twenty-five dollars were due for arrears of alimony, an attachment issued; and at *March* term following, *Rawle* for the defendant obtained a rule to shew cause why the attachment should not be quashed, upon the ground of a reconciliation prior to the attachment.

The rule being now called up for argument, the defendant,

to prove the fact of reconciliation, read depositions to the following effect:

Henry Ward deposed that *Martha Tiffin*, after having been separated some time from her husband, came and resided with him at his house in *Philadelphia* about the 6th of *September* 1806; that they lived together in apparent harmony and mutual good will, until some time in *October*, when the husband became involved in difficulties, and executions were laid upon his furniture; and that in about a week or ten days afterwards she left his house, where he nevertheless continued to reside for several months, when he sailed for the *West Indies*. The witness, who lived in the same house the greater part of the time, was present at several disputes and violent quarrels between husband and wife, in one of which she appeared to have been indulging in drink more than was proper; but after their quarrels they retired at night as man and wife. *Tiffin's* affairs were in a desperate situation when the wife returned; and at the time when the executions were levied, she said she would advance something out of her own money to discharge them, if the witness would advance a part; but upon inquiry into his affairs, she said he was more involved than she expected, and nothing was done. The furniture was then sold under the execution, and bought by the witness, who took possession of the house, and permitted every thing to remain in it until *Tiffin* went to the *West Indies*; but upon *Mrs. Tiffin's* return, after having been absent sometime, the witness ordered her to leave the house.

John B. Pons deposed that at *Mr. Tiffin's* solicitation, *Mrs. Tiffin* left her house in *New Jersey* and came to reside with her husband, in *September* 1806; that he worked in *Mr. Tiffin's* shop, and saw *Mrs. Tiffin* almost every hour of the day, managing and directing as a mistress, and appearing to agree well with her husband, until a short time after the 14th of *October*, when an execution was levied, and she left the house.

It appeared by the record that *Lee*, who was security for *Tiffin* upon the attachment, was plaintiff in one of the executions levied on his furniture and goods.

Sergeant and *Rawle* for the defendant, contended that by the ninth section of the act of 19th *September* 1785, 2 St.

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Law 384, the decree of the court; both as to divorce and alimony, was vacated by the reconciliation, and that no subsequent separation could revive it. The jurisdiction of the court under that section depends upon an actual separation occasioned by the husband; he must either maliciously abandon his family, or turn his wife out of doors, or by cruel and barbarous treatment force her to withdraw from his house. In such a case the court may decree either divorce and alimony, or one of them alone; but when both are decreed, the alimony is incident to the divorce, the decree being entire. Whether one or both be decreed, as the foundation of the decree is an actual separation, so by the terms of the section it continues in force only until a reconciliation takes place; and then, as the divorce is *ipso facto* at an end by mutual consent, the right to alimony *thereafter* falls with the divorce to which it is incident, and the right to the *arrears* falls in consequence of the revival of the husband's marital rights, like a bond given by a man to a woman who afterwards marry. There is no such thing as a *suspension* of the decree, where the parties are voluntarily reconciled out of court. The law provides for a suspension; but it is only where the husband by petition or libel in court, offers to receive his wife again, and treat her properly; and then if he fails to perform his offers, the court may order the decree to be revived, and the arrears of alimony to be paid. This suspension is therefore directed only for the protection of the wife, where the court are petitioned to order her return against her will; but where she voluntarily returns, she agrees to reinstate her husband in all his rights, and the decree is extinguished. Granting however that a reconciliation merely suspends the decree, still the court will not order it to be revived, without a new application by the wife, and sufficient cause shewn. Here was a fair *bona fide* reconciliation; and although there were quarrels and disputes, the wife was a more active party in them than the husband. There was nothing like cruel treatment to force her from the house, but she left it in consequence of the executions, which the husband could not prevent. The court will never revive the decree except for the same causes which originally produced it.

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Milnor and *Heatly contra*, argued that a reconciliation did not by the ninth section mean recohobitation, but a formal reunion of the parties under the sanction of the court. To construe it in any other way, would be to expose the wife to the entire loss of her alimony, upon cohobiting with her husband for a day. If the application of the husband came to the court, and the wife expressed her consent to return, the decree would be suspended to ascertain the sincerity of the husband's promises; and this is the only course consistent with the security of the wife, who, after the decree, is peculiarly under the protection of the court. But if there is such a thing within the meaning of the law as reconciliation out of court, it did not occur in this case, for two reasons: First, because there was merely an attempt at reconciliation which did not succeed. It was a trial, which, as it failed, had no effect upon the decree. Secondly, it was a trick on the part of the husband, either to get possession of her property, or to defraud her out of her alimony. She returned at his solicitation. The same treatment which led to the divorce, was renewed; and when one of the objects of the return was thought to be attained, the execution was devised to force her from the house. It was levied at the suit of the defendant's friend, who is now his security upon the attachment; and the furniture was bought by an inmate in his house, who would not permit Mrs. *Tiffin* to return after the short absence produced by the execution. The whole proceeding was a fraud; and therefore none of the results of a fair voluntary reunion can spring from it. It is due to the court not to permit a solemn decree to be put aside by circumvention.

TILGEMAN C. J. This cause comes before us on a motion by *James Tiffin*, to quash an attachment taken out against him by his wife *Martha*, on a decree of divorce and alimony pronounced by the court in *September 1803*. The motion is grounded on an alleged reconciliation which took place between them in *September 1806*. On this point evidence has been offered, and it is proved beyond doubt, that Mrs. *Tiffin*, at the instance of her husband, did return to his home and cohabit with him four or five weeks, during which time she acted as mistress of the family. Their harmony was

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not without interruption; but it cannot be said, that the fault was altogether on one side. *Tiffin* was in desperate circumstances. His goods and household furniture were taken in execution, and his wife left him; and after some time she took out an attachment, asserting that she had been fraudulently persuaded and tricked into a short reconciliation. Soon after the decree of this court, *Tiffin* conveyed to trustees for the use of his wife, in pursuance of the said decree, real and personal property of considerable value, which had belonged to her before their marriage. The alimony decreed by the court, was three hundred dollars a year, payable monthly; and it appears by the affidavit of the libellant, that three hundred and twenty-five dollars were in arrear, when she took out the attachment. The act of assembly is express, that the alimony shall only continue until a reconciliation shall take place. When the wife returns to her husband, she puts herself under his power, and gives up her claim to the arrears of her alimony.

The court are strongly inclined to promote the union, rather than the separation of married people. They are not disposed therefore to strain the construction of the act of assembly in favour of a wife, who having been reconciled to her husband, leaves him again without just cause. The causes for divorce from bed and board, are, the husband's maliciously abandoning his family, turning his wife out of doors, or by cruel and barbarous treatment, endangering her life, or offering such indignities to her person as to render her condition intolerable, or life burthensome. It is not proved that Mrs. *Tiffin* experienced any treatment of this kind after the reconciliation took place. When the household goods were taken in execution, she left her husband's house, which, unless she had received ill treatment, she ought not to have done; for she was bound to adhere to her husband, and share his fortune in poverty or riches. If upon receiving ill treatment, she had brought her case before the court supported by proof, it would then have been considered whether the act of assembly authorizes us to order the arrears of alimony to be paid. As the matter stands we have no such power. The opinion of the court therefore, is, that the attachment was improperly issued, and must be quashed.

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YEATES J. I have no hesitation in saying, that in family quarrels, the maltreatment of the wife by the husband, uniformly excites strong feelings in my mind, and that I view with much satisfaction every measure which tends to allay and compose those unhappy differences.

On the 14th *September* 1803 we separated *Martha Tiffin* from the bed and board of *James Tiffin*, and made the agreement of the parties the basis of our order of alimony. They lived in a state of separation for nearly three years, and came again together on the 6th *September* 1806 upon the solicitation of the husband; and so continued until the 14th *October* following, when the husband's effects being levied on under two executions, the wife left him.

The reconciliation of husband and wife by our act of 19th *September* 1785, vacates an order of alimony; and it is admitted on both sides, that the only question before us consists in the honest reality of that reconciliation. The counsel of the libellant have contended, that this temporary reunion was the effect of a fraudulent design to elude the decree of this court, and therefore not within the true reason of the law.

I know neither of the parties, nor their matrimonial conduct, except from the testimony taken in this cause. The husband has executed a deed to trustees, without reserving a power of revocation, of the property his wife had acquired before their intermarriage, in pursuance of the decree of this court. From the affidavit of the wife, stating that on the 12th *January* 1807, there were three hundred and twenty-five dollars due to her, it necessarily follows, that she must have received from him her separate maintenance for two years and three months.

I cannot consider the husband's soliciting his wife to return to his bed and board, as censurable, even if the embarrassed state of his affairs formed a considerable inducement to that measure. Mere pecuniary considerations too frequently form the *sine qua non* of matrimonial engagements even in early life. They had taken each other for *richer* or *poorer*. It has not been suggested that the pressure of *Tiffin's* debts was illusory; but it has been urged that *Lee* his present agent and bail was one of the plaintiffs in the executions. I see nothing in that circumstance from which

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I am warranted to conclude that his views were fraudulent. No one will deny that it is the duty of a good wife to follow the state of her husband. Whether his fortunes are prosperous or adverse, she should not desert him, unless on the strongest grounds. I regard the cohabitation of *Tiffin* and his wife for five weeks, as irrefragable proof of their reconciliation, and do not find myself at liberty to penetrate into the recesses of their chamber. The act was voluntary on her part, and we must presume was done upon due consideration. She thereby disrobed herself of her right to demand this money, and conferred on her husband a right to retain it, unless some instance of maltreatment or plain fraud can be shewn to entitle her thereto. On a mere offer by the husband to take the wife back, the court would deliberately examine all the circumstances which had led to that offer; but the reality and sincerity of the reconciliation can only be known to the parties themselves, with the different grounds which have influenced their conduct. Had we even the power, we have not materials sufficient to ascertain which of them was most liable to blame in their family broils, or to what sources their domestic discontents are to be ascribed. I content myself with observing, that sufficient evidence appears to place the wife in a most unamiable point of view. She has spread her own bed, and there she must be contented to lie, though it may now appear to her a bed of torture. I am of opinion the attachment should be quashed.

BRACKENRIDGE J. concurred.

Attachment quashed.

WILSON *against* JOHN.

IN ERROR. .

1809.

Philadelphia,
Tuesday,
December 26.

UPON a writ of error to the Common Pleas of *Chester* county, the case was thus:

It was an action of trespass and false imprisonment against *Wilson*, to which he pleaded *not guilty* and *justification*, with leave to give the special matters in evidence.

Upon the trial of the cause, the plaintiff proved his arrest under the following warrant signed by the defendant, and that he had been committed to jail by virtue of it. "The commonwealth of *Pennsylvania* to the 27th regiment of *Pennsylvania*, and 5th company. Whereas the persons named in the schedule or list hereto annexed," (including the name of *John*) "have by the court of appeal of their proper battalion, been duly sentenced to pay the fines to their names respectively subjoined, this warrant therefore authorizes and requires you, according to law, to levy collect and pay over all the fines aforesaid. Given under my hand and seal the fifth day of *November* one thousand eight hundred and three. *James Wilson*, captain (L. s.) To *Charles Stitt*, collector. To the constable of *Uwchlan*."

The defendant, to prove a justification under the militia law, then gave in evidence three commissions from the governor of *Pennsylvania* to himself, *William Kennedy* and *Jacob Barstler*, the two first as captains, and the last as lieutenant in the 27th regiment; and that they had acted under those commissions at the time of holding the court of appeals hereafter mentioned. He then offered in evidence the following document, purporting to be the proceedings of the court of appeals, having first proved the signatures. "At an appeal held *October* 28, 1803, at the house of *Benjamin Millard*, for hearing of the delinquents for non-attendance on military duty, we the subscribers have impartially heard all those who have made application, and to the best of our judgments, the following persons, belonging to captain *James Wilson's* company, are fined." (Then followed a schedule containing the name of *John* and others, and the

A militia court of appeals, which by law is composed of three commissioned officers appointed by the commanding officer of the regiment, is not a court of record, as it has not the power to fine and imprison, but merely to remit fines for certain causes. Before its proceedings can be read in evidence, in an action of trespass against a captain who justifies under its sentence, it must therefore be shewn that the court was regularly constituted, which can only be done by producing the commission of the commanding officer of the regiment, and the commissions of the officers composing the court, by shewing their appointment, and that in all material respects they have complied with the law.

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finer.) " Witness our hands, *James Wilson* captain, *William Kennedy* captain, *Jacob Barstler* lieutenant, Judges.

To this evidence the plaintiff objected, and it was ruled to be inadmissible, until it should be proved that the court was legally constituted, and had taken an oath or affirmation, according to the 17th section of the militia law of the 6th April 1802, which is as follows: "*And be it further enacted &c. that* " in order to ascertain those persons who by their absence " on days of exercise, shall have incurred the fines before " mentioned, a sergeant, or the clerk of each company, on " every such day, in the presence of the captain or command- " ing officer of the company, at the end of one hour after " the time appointed for the meeting of the company, batta- " lion, or regiment, and also after the exercise is over and " before the men are dismissed, shall call over the muster " roll of the company, noting those who are absent; and " within two days after every company or regimental meet- " ing, a return shall be made by him to the captain or com- " manding officer of each company, under the penalty of " five dollars for every time he shall neglect or refuse to " make such return of all the absentees on the several days " of exercise, particularly designating the day on which each " default was made; and it shall be the duty of the *command- " ing officer of each regiment* annually, in regimental orders, " to be issued previous to the days appointed by this act for " training the militia in the months of *May* and *October*, to " appoint *six commissioned officers*, three to preside in each " battalion for the current year as a court to hear appeals, " who, when sitting as such court, shall be under oath or affir- " mation, to be administered by any judge or justice of the " peace, to perform their duty with fidelity and impartiality; " and who shall, in not less than ten nor more than fifteen " days after the meeting of the regiment in the months of " *May* and *October* annually, hear the appeal of every per- " son conceiving himself aggrieved and applying to be " heard; and if it shall appear to the satisfaction of the court " of his proper battalion, that by lameness or sickness or any " unavoidable necessity, his attendance was rendered imprac- " ticable on the day or days for which he may stand charged, " the said court shall remit the fine or fines incurred, for the " reasons aforesaid ONLY; but no excuse shall be received, nor

"any redress given by them at any other time, or in any other manner than is before mentioned." 5 St. Laws 234.

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The defendant then proved that an oath or affirmation was duly administered to the judges, before they proceeded to the execution of their duty; and having called *Joseph Grier*, who swore that he appointed the persons before mentioned to hold the court of appeals, and that at that time he commanded the 27th regiment as lieutenant colonel, the defendant again offered in evidence the proceedings of the court. But they were a second time objected to, upon the ground that it ought first to be proved that *Grier* was lieutenant colonel of the regiment, which could be done only by shewing his commission; and the court being of this opinion, the evidence was rejected, and the defendant tendered a bill of exceptions.

Frazer for the plaintiff in error, contended that the most reasonable construction of the law should be adopted, for the protection of officers, since the militia system was throughout compulsory upon them, and in this particular case the defendant was bound by the 19th section, under a severe penalty, to issue his warrant to the constable within ten days after the sentence of the court of appeals. The question is, not whether the proceedings were conclusive as to what they set forth, but whether the defendant was not entitled to read them in evidence without producing the commission of a third person. They should have been read upon two grounds. 1. Because they were the proceedings of an inferior court of record, which required no proof but the signature of the judges. 2. Because the parol proof was equal to if not better than the commission required.

1. The court was constituted by the 17th section of the militia law, with power to sentence military delinquents to a fine, the payment of which may be enforced by imprisonment; and it is therefore an inferior court of record. Such must have been the opinion of the legislature, or they could not have thought it necessary by the 18th section to provide that no *certiorari* should issue to remove its proceedings to any court in the commonwealth, nor would they have spoken of its decisions by the name of *sentences* and *decrees*, of which they prohibit all courts from taking cogni-

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zance in the way of appeal. Such also is the result upon the principles of the common law, by which every jurisdiction erected *de novo* with power to fine and imprison, is a court of record. *Groenvelt v. Burwell* (a). 3 Bl. Comm. 24. That the fine is fixed by law, is no objection, because so it is in a variety of cases cognizable by the quarter sessions; nor is it of any moment, that the judges exercise the jurisdiction by way of appeal, and do not issue the warrant to execute their own decrees, because they constitute the only tribunal for definitively fixing the militia fines, and it is in fact their sentence which is executed by the warrant of the captain. Being thus an inferior court of record, the proof in question should not have been asked of the defendant, who was not sued as a member of the court, but for his independent act. Had the members of the court been sued in trespass, their authority might have been questioned; but since they had jurisdiction as to the matter of fines, unless their want of jurisdiction as to the person or place appeared on the record, the defendant was not a trespasser, whatever were the errors of the court; *Bull. N. P.* 83; *Terry v. Huntingdon* (b); *The case of the Marshalsea* (c); particularly after the appeal had gone by. *Durant v. Boys* (d).

2. It is the duty of the *commanding* officer, not of the lieutenant colonel particularly, to appoint the court. Who was the commanding officer, is a matter in *pais*, to be proved by parol, and not by the commission. Besides, the commanding officers of regiments do not derive their authority from their commission, but from their election by the militia, which distinguishes this from the common case of a commissioned officer; and there is in the very act under which the defendant justified, a recognition by the legislature that *Grier* commanded the 27th regiment.

Hemphill and *Ross* for the defendant in error. The plaintiff below was imprisoned by the act of *Wilson*, who was desirous to justify under a paper signed by himself and two others as a court of appeals; and the point is, whether to make that paper evidence, it was necessary to shew that the

(a) 1 Ld. Ray. 467.

(b) *Hardress* 480.

(c) 10 Co. 76 a.

(d) 6 D. & E. 580.

court had a lawful existence. The questions then are,
 1. Whether the proceedings of the court are even *prima facie*
 evidence of the court's authority. 2. Whether sufficient proof
 was given *dehors*.

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1. The court of appeal has none of the properties of a court of record. The only circumstance relied upon to give it this character, is the power to fine and imprison, which it does not possess. The fine is incurred before a return is made to the court, and its authority is exclusively confined to the *remission* of it, and that for the specified causes of sickness, lameness, or unavoidable necessity, and no other. It has no power whatever to punish, but only in a limited way to mitigate punishment; and it is this which distinguishes the present case from *Groenvelt v. Burwell*, where Lord *Holt* limits his principle thus, that where a man has power to *punish* another for his offence by fine and imprisonment, he has judicial authority; and when a court is erected with this authority, it is a court of record. The court of appeals moreover have no authority to imprison; it is the captain who issues the warrant, not upon their sentence, for they never decree any thing but a remission; but upon the sentence of the law, where the court do not interfere. The proceedings not being evidence, it became the duty of the defendant in an action of trespass to prove every thing. If a man justify a trespass as justice of the peace, he must shew his commission. *Esp. Dig.* 741. If a court martial exceeds its jurisdiction, the members are trespassers, and so is the officer executing their warrant. *Wise v. Withers* (a). It is therefore necessary to shew jurisdiction, which cannot be shewn unless the legal existence of the court is first proved. Even the judges of a superior court, must shew their authority, if sued in trespass. *Gwinne v. Poole* (b).

2. Whether *Grier* was commanding officer within the law, was not a fact to be proved by parol. If it were immaterial whether he commanded lawfully or unlawfully, it might be so; but the question is, was he lawfully appointed commander. And of this the commission was the best evidence. He might have been elected, but unduly; he might have commanded, but unlawfully; the best evidence of his valid elec-

(a) 3 *Granch* 331.(b) 2 *Lutw.* 1560.

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tion and of his lawful command, was the commission. It was not only the best evidence, *Peake Ev.* 8, but it is almost impossible to shew an appointment otherwise than by proving a commission. *Marbury v. Madison* (a). As to the recognition in the act of assembly, it amounted to nothing, because the law was passed in 1802, and the question was as to his command in 1803.

Frazer in reply said, that however judges of a court of record might be forced to shew their commissions when personally sued in trespass, it certainly was not the case with the prothonotary who issued the writ, in which relation the defendant might be considered as standing to the court of appeals. In *Marbury v. Madison* the appointing and commissioning power were the same, and therefore the commission was almost essential to the proof of the appointment. Here the election was by one body, and the commission by another; so that there might be a valid election and command without a commission.

TILGHMAN C. J. delivered the court's opinion.

This action was brought in the Common Pleas of *Chester* county, by *David John* the defendant in error against *James Wilson* the plaintiff in error, for a trespass in issuing a warrant as captain of the militia, by virtue of which the plaintiff below was arrested. The defendant justified under the militia law, passed 6th *April* 1808; and in the course of his defence, offered in evidence a paper writing, purporting to be the proceedings of a court of appeals, which was objected to by the plaintiff, and overruled by the court. This is the first exception in the cause. The law directs that the court of appeals shall consist of three commissioned officers, to be appointed by the commanding officer of the regiment, who shall, when sitting, be under oath or affirmation to perform their duty with fidelity and impartiality. The Court of Common Pleas were of opinion it should be proved, not only that the members of the court were officers, by producing their commissions, but also that they took the oath prescribed by law. In this we think they were right. This court is of the

(a) 1 *Crauch* 155.

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nature of special commissioners, and not a court of record as the defendant's counsel have contended. It is said they have power to fine and imprison, which is the distinguishing quality of a court of record. But they have no such power. Their authority is limited to *remitting the fines* of such appellants, as shall give satisfactory proof, that their non-attendance on the days appointed for exercising the militia, was occasioned by "lameness, sickness, or unavoidable necessity." It was necessary therefore to prove, before the proceedings of this court were read in evidence, that they were legally constituted, and had pursued the law in all material points.

The Court of Common Pleas having delivered their opinion on this point, the defendant gave evidence that the court of appeals had taken the oath prescribed, and then offered their proceedings in evidence again; at the same time offering parol testimony, that lieutenant colonel *Grier*, by whom they were appointed, was commanding officer of the regiment. The court rejected the evidence a second time, because the commission of lieutenant colonel *Grier* was not produced. In this also we think they were right. A man may assume command without lawful authority. The lawful authority is the commission, and that is to be proved by producing it in court. Our opinion therefore is that the judgment of the Court of Common Pleas be affirmed.

Judgment affirmed.

HEYDRICK *against* EATON.

Philadelphia,
Friday,
December 29.

RULE upon the plaintiff to shew cause why the inquisition and condemnation of the defendant's estate should not be set aside, he not having received notice of the time and place of holding the inquest.

An inquisition cannot be supported unless there has been notice in fact to the defendant, either of the levy or of the time and place of holding the inquest.

T. Ross for the defendant argued, that under the act of 21st March 1806, 7 St. Laws 566, express notice of the inquisition ought to have been given to the defendant, without which he could not claim the right of having it held on the

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land. But that if this was not necessary, at least he should have had notice of the levy, to prepare him for the subsequent proceedings. In *Snyder v. Castor* (a) the levy and inquisition were set aside upon the same objection.

(a) *SNYDER v. CASTOR administrator of CASTOR.*

This case has been more than once cited for a point, which, although it was made upon the argument, was not decided by the court.

A levy upon any thing less than a whole tract or lot of land, is void. A *fi. fa.* to *July* term 1807, was levied on thirty acres of land, the estate of the intestate, and the same was condemned. At *December* term 1807 an affidavit of the defendant was produced, stating that the thirty acres were part of one whole tract of two hundred acres, and that he had received no notice of the inquest, nor any information of it, until after it had been held.

Upon this affidavit *Franklin* obtained a rule to shew cause why the levy and inquisition should not be set aside. On the return of the rule a deposition of the deputy who made the levy was read, stating that directly after making the levy he told the defendant what he had been doing, and in a subsequent conversation informed him of the time and place of holding the inquest.

Franklin and *Ingersoll* contended that the levy was void by the 11th section of the act 21st March 1806, being made upon part of a tract; and that formal notice of the inquest should have been given to the defendant.

S. Levy and *Hopkinson* shewed cause. The objection to the levy is waived by suffering the *July* term to go by. Such a levy is good if the defendant assents, and his not objecting at the first term is conclusive of his assent. Formal notice of the inquisition is not necessary; any notice is sufficient; the act does not require it, and the use is merely to give an opportunity of calling the inquest on to the land. Here the deputy sheriff swears to information, which is notice enough.

Reply. The *July* term is one day, and there is no evidence that the writ was returned on that day. The judge who holds the court has authority to make only such orders as are preparatory to trial, and therefore all he could have done, would have been to stay proceedings, which would have left the plaintiff where he is now. The defendant denies notice. It should be formal written notice, to prevent this collision of testimony.

PER CURIAM. Levying upon any thing less than one whole tract or lot of land with the appurtenances, is clearly against the act of assembly; and we are far from thinking that it was proper before that act; it evidently tends to defeat the design of an inquest. The question then is, has the defendant acquiesced? We think not. There is no evidence, and it is not probable, that the writ was returned on the day; and if it had been, the interference of the court would only have been to stay proceedings until the present term. The court give no opinion upon the point of notice,

Milnor for the plaintiff. The rule goes to the inquisition and condemnation only, and therefore it must be presumed the levy was regular and known to the defendant. If this was the case, notice of the inquest was useless; because the levy was sufficient notice of all that was to follow. The act of assembly does not require notice of the inquest to be given to the defendant; the only notice required is from him to the sheriff, if he wishes the inquest to be held on the land; and the levy was an admonition to him to express the wish if he felt it.

TILGHMAN C. J. But did the defendant in fact know of the levy?

Ross offered to read the defendant's affidavit that he did not.

Milnor objected, upon the authority of *Hoar v. Mulvey* (a).

Court. The affidavit cannot be read, but the plaintiff must shew notice; the defendant is not bound to prove a negative.

Time was then given to the plaintiff to prove notice of the levy; but at a subsequent day, *Milnor* informed the court that proof could not be obtained.

TILGHMAN C. J. Construe the law as you will, the inquisition must be set aside. It is not necessary to say how the case would be, if there had been notice either of the levy or inquest; but where there has been neither, the proceedings cannot be supported. Here the defendant had no notice of the levy, nor any except the general notice of the inquest, put up in the prothonotary's office. Let the rule be made absolute.

YEATES J. of the same opinion.

BRACKENRIDGE J. I take this occasion to express my opinion, that the notice required by the act, has nothing to do with the levy, but relates solely to the inquisition. The return of the levy is notice; but there does not appear either time or place for holding the inquisition, without notice to

as it is not necessary to the decision of the case; they think the levy was clearly improper, and therefore make the rule absolute.

Rule absolute.

(a) 1 Binn. 145.

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the defendant. The object of the act was to prevent surreptitious inquests to procure the condemnation of property, without giving the defendant an opportunity to shew that the rents and profits would pay in seven years. They might be held in an obscure place, or at an unseasonable time; but when notice is given, the defendant may say, hold the inquest on the land.

Rule absolute.

Philadelphia,
Saturday,
December 30.

YOUNG against TAYLOR and BARRON.

If a plaintiff levies a *f. fa.* upon the defendant's lands, and then charges him in execution upon a *ca. sa.*, either the *f. fa.* or *ca. sa.* may be set aside at the election of the defendant; but if he submits to the *ca. sa.* and obtains a discharge from it by the insolvent law, then the *f. fa.* and all proceedings under it are gone; and if the plaintiff sues out a *venditioni exponas* and sells, the court will not permit the sheriff to acknowledge a deed to the purchaser.

If the lands of the defendant are aliened by him before the plaintiff's judgment or execution, the plaintiff is not obliged to take a *scire facias* against the terre-tenants, before he can have execution in the hands of the alienee.

An execution within a year and a day, continues the lien of a judgment, without resorting to a *scire facias* under the act of 4th of April 1798.

Q. Whether a sale of the defendant's lands under a younger judgment, affects the lien of an older one?

IN this case, the sheriff having requested the court to take his acknowledgment of a deed to the plaintiff for certain lots sold to him under his execution against the defendants, the court, upon the motion of *Binney* for *J. G. Wachsmuth* and others, and upon a statement of the facts hereafter mentioned, which appeared of record, refused to receive the acknowledgment until counsel should be heard in opposition to the deed.

The case being now called up for a hearing, *S. Levy* for the plaintiff, objected to the interposition of counsel except on behalf of the defendants; but it being answered, that the facts would shew a privity between *Taylor* and the persons who opposed the acknowledgment, the court directed the evidence to be opened.

On both sides the material facts were these: On the 20th of April 1792, *John M. Taylor*, one of the defendants, was seised of two lots in the city of Philadelphia, (the property sold to *Young*) which on that day he conveyed to *Mordecai Lewis* and others in trust for his creditors. On the 10th July 1792, *Lewis* and others assigned to *Joseph Ball* upon the same trusts; and on the 8th October 1800, *Ball* and *Taylor* and wife joined in a conveyance to *J. G. Wachsmuth* in

consideration of four thousand dollars. The conveyances in trust were never proved or acknowledged until the 15th *March* 1798, and on the 16th they were duly recorded. The conveyance to *Wachsmuth* was acknowledged the day it bore date, and was recorded the 22d *January* 1803.

On the 11th *December* 1797, a judgment was confessed in this court by *Taylor* in favour of *Gabriel Furman*, for thirty thousand dollars the damages laid in the declaration, to stand as a security for what should be recovered at the trial; and on the 16th *March* 1798 the debt was liquidated at 16,717 dollars 34 cents.

On the 14th *March* 1798, the plaintiff obtained judgment in this suit for 1495 pounds, with a stay of execution for five months.

On the 19th *March* 1798, *Samuel Williams* obtained judgment in this court against *Taylor* for one hundred and fifty-seven dollars sixty-four cents; and a *fi: fa:* under this judgment being levied upon the *two lots* in question, they were sold on a *venditioni exponas* to *Gabriel Furman* for one hundred dollars, and a deed executed to him on the 13th *March* 1800, which on the 26th *November* following was acknowledged in court. On the 2d *February* 1801, *Gabriel Furman* conveyed to *J. G. Wachsmuth*.

On the 11th *July* 1799, the plaintiff issued a *ca. sa.* against the defendants, upon which *Taylor* was committed to prison on the 15th; the writ was returned *non est inventus* as to *Barron*. On the next day *Taylor* was discharged from custody by the Chief Justice, upon his giving bond according to the act of 4th *April* 1798, to comply with the insolvent law at *September* term; but he took no step at that term, and in *December* term following he merely filed his petition, without prosecuting the matter further.

On the 21st *May* 1800, the plaintiff issued a *fi: fa:* against the defendants which was levied *inter alia* upon the *two lots* in question, and in *August* following they were condemned. On the 13th *December* 1800, he issued an *alias ca. sa.* upon which *Taylor* was again arrested, and on the 16th *December* he was again discharged from custody on giving a bond with the same condition as before, which was accepted by the plaintiff's attorney, and filed in court. Agreeably to this bond, he applied for his discharge under the insolvent

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law at the *December* term, and in *January* 1801, he was discharged in the usual manner. *Young* afterwards issued a *venditioni exponas* to *December* term 1806, under which part of the property condemned in *August* was sold; and by an *alias venditioni* to *July* term 1808, the two lots were sold to him for 1050 dollars, and the deed in question executed by the sheriff.

Upon these facts, *Binney* and *Rawle* contended that such an interest was shewn in *Wachsmuth* and others his vendees, as entitled them to take *Taylor's* place in opposing the deed to *Young*. They are purchasers under an assignment from *Taylor* before all the judgments, and also under a sheriff's deed duly acknowledged in court. At the same time no decision is asked upon title in this summary way; it is disclosed to shew an interest in the question, and for no other purpose.

The objections to the acknowledgment of the present deed, rest partly upon the fact that the property has already been sold under an execution against the same defendants, sanctioned by the acknowledgment of the sheriff's deed; but principally on the invalidity of the plaintiff's proceedings; and as they cannot be heard collaterally in an ejectment, the law of 1705 in devising the ceremony of acknowledgment, impliedly enjoins upon the court to hear them in this stage of the cause. They are four. 1. That as there had been an alienation of the lots prior to the plaintiff's judgment and execution, he could not execute the land, without previously issuing a *scire facias* to the terre-tenants. 2. That the plaintiff's judgment being more than five years old at the date of his *venditioni*, and never having been revived according to the act of 4th *April* 1798, its *lien* on these lots was lost, and the intermediate disposition of them to other persons, was a bar to his execution. 3. That the *ca. sa.* upon which *Taylor* was charged in execution was a satisfaction of the plaintiff's judgment; and the *fi. fa.* being issued while the *ca. sa.* was in force, the levy and condemnation were irregular; or if not, then the *alias ca. sa.* and commitment were a complete waiver of the *fi. fa.*, so that all subsequent proceedings under it were void. 4. That the lots having been once sold under a younger judgment, and bought by the oldest judgment cre-

ditor, no execution could issue from this court to sell them a second time as the property of *Taylor*.

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1. It is a general rule of law, that where the inheritance or freehold of land is to be charged by reason of any suit or writ, the tenant of the freehold ought to be made a party to it. *Mallory v. Jennings* (a), *Jefferson v. Morton* (b). Hence it has become a settled practice not to reverse a fine without a *scire facias* to the terre-tenants, who ought not to be put out of possession without warning, and who may have a release to plead, or some other defence to make. 1 *Salk*. 339. *Tully's case* (c), *The case of Eccleston and wife* (d), *Cary v. Dancy* (e), *Clerk v. Hardwicke* (f). It is a provision introduced for the protection of purchasers, to give them an opportunity of making that defence, which after execution they may be precluded from making; and if this be the law upon a voluntary alienation by the defendant, how much more where the terre-tenant is the alienee of the sheriff, whose sale has been sanctioned by the court.

2. The first section of the act of 4th April 1798, 4 *St. Laws* 301, provides that no judgment then on record, shall continue a lien on the real estate of the defendant during a longer term than five years from the passing of the act, unless the plaintiff or his representatives shall within that period revive it by *scire facias*. The object of the law was express notice of the judgment to all parties interested; for the third section directs service of the *scire facias* upon the terre-tenants and the defendant or his feoffees, and where they cannot be found and there is no occupant, a proclamation in open court at two successive terms. *Young's* execution within the year and day is of no importance; the law is an express unqualified destruction of the lien, unless there is a revival by *scire facias*. The evil to be remedied was the continuance of liens in perpetuity, without express notice to purchasers; the remedy was a revival by *scire facias* every five years with notice. A continuance of the judgment by execution, was therefore in nowise contemplated by the law, as rendering the *scire facias* unnecessary, because it was in part the very evil to be cured. The execution is not fol-

(a) 2 *And*. 160.(c) 2 *Salk*. 598.(e) *Cro. Elis*. 471.(b) 2 *Saund*. 6.(d) *Dyer* 321 a.(f) *Moore* 524.

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lowed by notice to any one; and after it has once issued, the judgment, if affected by it at all, continues to be a lien forever, without any further proceeding. The law on the other hand demands notice in every period of five years, upon pain of losing the lien. The uses of the execution and of the *scire facias* are also entirely different. The one is to entitle the plaintiff to an execution at any future day, the other to preserve the lien of his judgment. His lien exists for five years after judgment, whether execution issues or not; in like manner his judgment may be continued so as to entitle him to execution, although it has lost its lien. It follows therefore that *Young's* judgment had lost its lien on these lots, if it ever had any, and that he could not issue execution against them in the hands of an intermediate purchaser.

3. *Taylor* was committed to prison upon a *ca. sa.* in July 1799. When the body of the defendant is taken in execution, although it be not in itself any satisfaction, yet as to him there cannot be any other execution. *Williams v. Cutleris* (a), *Foster v. Jackson* (b), *Cohen v. Cunningham* (c). Notwithstanding the discharge by the Chief Justice, the *ca. sa.* continued in force, because the condition of the bond was, that in case he failed to obtain his discharge, he would surrender himself to prison to be charged by the plaintiff's execution; 8 *St. Laws* 136; and in that case he would have been in custody under the original *ca. sa.* While this *ca. sa.* was in force, the *fi. fa.* could not issue; particularly as at all events the former writ had destroyed the plaintiff's lien, and set up other judgments in preference to it. *Freeman v. Ruston* (d). But if the *fi. fa.* was valid, the *alias ca. sa.* and commitment at *December* term 1800, do most clearly overthrow it, and make void all subsequent proceedings built upon that foundation. Two executions cannot be in force at the same time upon the same judgment. Had *Taylor* when in custody applied to the court, they would either have discharged him, or quashed the *fi. fa.*, at his election. *Stamper v. Hodson* (e). He chose to assent to the *ca. sa.* and obtained his discharge by the insolvent law in consequence of it. The *fi. fa.* was therefore at an end. *Young* cannot now be per-

(a) *Cro. Jac.* 136. 143.

(b) *Hobart* 57. 59. 60.

(c) 8 *D. & E.* 123.

(d) 4 *Ball.* 214.

(e) 8 *Mod.* 280.

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mitted to say that the *alias ca. sa.* was void, for the purpose of setting up the prior execution; he cannot take advantage of his own wrong; but the court will say upon our suggestion, what it would have said upon the motion of *Taylor*, that the *fi. fa.* was waived, that it ought to be quashed, and that no valid sale can grow out of it.

4. The last point is of immense importance to purchasers at sheriff's sales. A sale, even under the youngest judgment, when confirmed by the court, passes all the defendant's estate; and upon every principle it should be held to bind all other judgment creditors, and to debar them from executions against the same property. It should bind them upon the ground of laches, because being a public act, they are presumed to have notice, and should make their objections before the deed is acknowledged. It should bind them upon equitable principles, because the best price is gotten for the land, and that is distributed among the judgments according to their priority. It ought to bind them upon strict principles of law, because the right to sell in satisfaction is incident to every judgment, and by the acts of 1700 and 1705, 1 *St. Laws* 12. 67, a sale made under any judgment passes an estate to the purchaser as fully as it was to the debtor. It is analogous to a sale of goods under a younger *fi. fa.*, which, however it may affect the sheriff, passes a title to the vendee. *Smalcomb v. Buckingham (a)*, *Clerk v. Withers (b)*. In practice such a sale is universally deemed binding; no inquiry is ever made by purchasers into the rank of judgments; and if this court should hold otherwise, it would not only produce the greatest confusion in titles hereafter, by giving a sanction to ten or twenty sheriff's deeds for the same property upon executions against the same man, but would shake a great many titles already acquired. If however the youngest judgment cannot sell, none but the oldest can; and here the proprietor of the oldest bought at the sale under the youngest, and confirmed it. There can be no doubt that *Furman's* judgment was the oldest lien. It was not an interlocutory judgment in *December 1797*, but a final judgment by agreement for a large sum, as security for the payment of a smaller sum to be subsequently ascertained.

(a) *Carth.* 419.(b) 6 *Mod.* 292.

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S. Levy and *Dallas* for the plaintiff insisted, that an interference of the court in the way required was without precedent; and that however it might be insinuated that the object was not to try the title, yet if the acknowledgment was refused, it would be decisive as to the title of the plaintiff, who without it could never attempt an ejectment. The plaintiff can prove upon a trial, that *Wachemuth* has neither a legal nor an equitable title; that the assignments by *Taylor* were waste paper, never enforced, never supposed to have any validity, never even used to restrain *Taylor* from the control and alienation of the property assigned, until two days after *Young's* judgment, when they were hunted up and recorded to defeat it; that *Furman's* judgment was not only interlocutory until after *Young's* judgment was entered, but that *Furman's* debt was provided for and satisfied by an assignment of personal property; and that the sale of the lots for one hundred dollars under the judgment of *Williams*, was not supposed to be worth any thing, the reduced price being the consequence of representations at the sale, that *Taylor* had no estate to be sold. These are objections which in this summary way we cannot examine. The plaintiff is entitled to bring them before a jury; the right is secured to him by the constitution; and the interposition of the court will therefore not only be in collision with the recent case of *The Pennsylvania Insurance Company v. Ketland (a)*, but it will deprive the plaintiff of his constitutional rights. In fact the court has but a ministerial duty to perform in receiving the acknowledgment; it is the right of the sheriff to make it. Be this, however, as it may, the objections to the acknowledgment have no weight.

1. A *scire facias* against the terre-tenants, except in the case of a mortgage, has never been heard of in *Pennsylvania*, as a preliminary to execution. It is not required by the act of 1705, under which sales of land are made; and it would lead to a total defeat of the judgment creditor by collusive alienations, if it should ever obtain. It is not required even in *England*. *Fitz. N. B.* 597. The authorities cited are not to the point. They apply exclusively to two descriptions of cases, which have not a feature of resemblance to the present.

(a) 1 *Binn.* 499.

The first is where there has been a change of parties by death; and there a *scire facias* introduces the new party, whether heir or terre-tenant. Such is the case of *Jefferson v. Morton*. The other is where the proceeding is to reverse the title under which the terre-tenants hold. Such is *Tully's case*, *Cary v. Dancy*, and the case of *Eccleston and wife*. There is a third class of authorities, where the point has been raised, whether without notice to the terre-tenants, the land could be charged by the execution, as *Mallory v. Jennings*, and *Clerk v. Hardwicke*; and it was well decided that it could not be. But the meaning of those decisions is, that the terre-tenant would not be bound, unless a party. Nor is he here. The judgment binds nothing but the defendant's estate; the execution sells nothing else; and upon an ejectment, the deed does not conclude the terre-tenant, but he is at liberty to shew that the defendant had no estate. In *Graff v. Smith (a)* the execution of an intestate's lands in the hands of a purchaser was resisted upon every ground; but the want of a *scire facias* was not thought of.

2. The act of 4th April 1798 has no impression upon the case. The mischief before that law was, that judgments upon which there had been no proceeding, were alive as to the lien, though dead as to the purpose of execution. The law therefore provided, that unless such judgments were revived by *scire facias*, they should not bind the land. But a judgment upon which an execution has issued in due time, never dies; and therefore it cannot possibly require revival. The object of the *scire facias* it is said, is to give notice. But can it be doubted that an execution executed, as *Young's* was, is equivalent to a *scire facias*, in the particular of notice? The intention of the legislature is in some measure to be obtained from the preamble; and by that it appears, that all the evil in contemplation, was the perpetual lien of judgments, without any process to CONTINUE or revive the same. Here there is a clear exception of judgments upon which process has issued; so that the mode of preserving a lien by issuing execution, remains as it was before the law.

3. The general principle that a *ca. sa.* executed debars the plaintiff from any other execution, may be admitted; but the

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(a) 1 Dall 481.

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circumstances of the case raise a distinction. The first *ca. sa.* was not a perfect execution, because the plaintiff lost the benefit of his writ by the discharge of *Taylor* from custody. Upon the defeat of this execution by operation of law, the remedy against the land revived. If while *Taylor* was in prison, a younger judgment had sold the land, *Young* it is true could neither have vacated the sale, nor claimed the proceeds; it is an inconvenience arising out of the law, and such is the decision in *Freeman v. Ruston*. But that is not the present case. The *ca. sa.* was defeated. It could never be executed again. If *Taylor* did not chuse to perform the condition of his bond, the remedy was on the bond, and not by charging him again on the old writ; and it follows therefore that he had a perfect right to levy the *fi. fa. Selwyn's N. P.* 548, 549, 550.; 8 *St. Laws* 138. sect. 19. The *fi. fa.* being regular, the only question then is as to the effect of the *alias ca. sa.* While the *fi. fa.* levy and condemnation were in force, *Young* could not in any way discontinue the *fi. fa.* without leave of the court. *M'Cullough v. Guetner (a)*. He could do no act which amounted to a discontinuance; and as two executions under the same judgment, cannot be in force at the same time, it follows that the *alias* was void, and did not affect the *fi. fa.* 1 *Crompt.* 531. 536. 537.; 2 *Tidd* 912.; *Hobart* 2.; 11 *Viner* 32, pl. 6. The court will now do the same in relation to the *alias ca. sa.*, as they would have done in 1800; and they could not but have said at that time, that the *ca. sa.* which to say the least of it was irregular, should not be deemed a waiver of process previously well executed. In fact, by the positive provision of the 17th section of the insolvent law, 8 *St. Laws* 136, after the order of discharge by the Chief Justice in 1799, no *ca. sa.* could issue against *Taylor*; so that the *alias* was void by the act of assembly, as well as upon general principles.

4. The fourth point it is the less necessary to discuss, because every thing said under it, goes to the matter of title, which may be used upon an ejectment; but as a general position, it can never be maintained, that the mere acknowledgment of a sheriff's deed, however fraudulent the proceeding, shall debar all the world from selling the land again, and

(a) 1 *Binn.* 214.

contesting the first deed before a jury. If the proceedings are regular, the court are bound to give deeds even to fifty contending purchasers, that they may resort to the constitutional tribunal of a jury, for a decision on their title.

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TILGHMAN C. J. gave no opinion, having been of counsel in *Furman's* suit.

YEATES J. delivered the opinion of the court.

Samuel Young has applied to the court to accept the sheriff's acknowledgment of a deed for two lots of ground in the city of *Philadelphia*, levied on by the sheriff as the property of *John M. Taylor*, and sold at public vendue for 1050 dollars. It would be a matter of course to take the acknowledgment, if good ground is not shewn against it. Without this sanction of the court, the sheriff's deed can have no legal operation; and it behoves the party who opposes the sale on the ground of irregularity, to make his exception, *previous* to the court's approving of the deed. For it has often been decided, that on the trial of an ejectment instituted by the sheriff's vendee, the court will not inquire into the formality of the proceedings on which the sale was founded; it amounting in fact to an attempt to reverse the process of one court in one cause, by another court *collaterally* in another cause.

The counsel of Mr. *Young* have contended, that *Taylor* alone could except to the acknowledgment; and that Messrs. *Wachemuth* and *Fisher* not being parties to the record, were incompetent to take the exception. They cannot be considered as mere interlopers, but are interested in the present application. There is some kind of privity between them and *Taylor*. They claim the lots of ground in controversy, both under a conveyance from *Taylor* and Mr. *Joseph Ball* his assignee, and under a prior sale of the premises as the property of *Taylor* by a former sheriff. If it clearly appeared on the representation of a mere stranger, that the proceedings had in the cause were erroneous, and the process of the court abused, would the members of this court shut their ears against the information? There is now no appeal from the decisions of this court to another tribunal; and it is particularly incumbent on us to see that justice is dispensed in its accustomed channels.

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We desire to be fully understood in the present instance. Our uniform practice has been to refuse trying the title of lands, or the property in goods levied upon, under a writ of *fiери facias*. The reason is perfectly plain. It would deprive the adverse party of his constitutional right to a trial by jury. We lay it down as a general rule; but do not however assert that there may not be exceptions to it, or that such a case might not occur, as would demand our immediate interposition. The circumstances must be strong indeed which would warrant it. We mean to insinuate no opinion whatever upon the conflicting titles here.

1st. The first objection made to the proceedings under the judgment of *Young* against *Taylor*, is, that no *scire facias* has issued against the terre-tenants of the premises, upon the change of title. We do not think this exception well founded. Neither the act of assembly of 1705, nor the practice which has obtained under it, demands such process. In fact it would render the provisions of the act illusory. A defendant might on judgment obtained against him, and previous to the issuing of a *fiери facias* against him, alien his lands. When the *scire facias* issued against the terre-tenant, he might again alien and change the possession before judgment thereon, and thus the proceedings might be protracted by adroit management for an indefinite period of time, and the remedy of the creditor by execution against the lands of the debtor, be rendered fruitless.

2d. The second objection, founded on the act of assembly of 4th April 1798, "limiting the time, during which judgment shall be a lien on real estate," seems without just grounds. The first section of that law is alone applicable to the present case, as it respects judgments on record at the time of passing the act. It directs "that no such judgments shall continue a lien on the real estate of the defendant during a longer term than five years, unless the person who has obtained such judgments, or his legal representatives, or other persons interested, shall within the said term of five years sue out of the court, wherein the same has been entered, a writ of *scire facias* to revive the same." No change is contemplated in the law, as to the lien of judgments, excepting those unrevived within the five years; nor is the mode of keeping judgments alive by issuing an execu-

tion within the year and day, superseding the necessity of issuing a *scire facias* under the statute of *Westminster 2d*, abolished thereby. The *scire facias* operates as notice to the parties interested, and evidences the intention of the creditor to claim the lien of his judgment. But it will not be denied that the plaintiff taking out a *fieri facias*, levying on the goods and lands of the defendant, and condemning the lands by an inquest, are matters of notoriety, and in point of notice of the creditor's pretensions, tantamount to a *scire facias*. Such I take it, has been the construction of this section of the act.

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3d. I proceed to the third objection, which seems to us to be solid. Here it becomes necessary to take a summary view of the facts. *Young* obtained his judgment against *Taylor* and *Barron* on the 14th *March* 1798, with a stay of execution of five months, which expired on the 14th *August* following. On the 11th *July* 1799, within the year, he issued his *ca. sa.* returnable to *September* term following, upon which the sheriff arrested *Taylor* on the 15th *July*, and had him in custody, but returned *non est inventus* as to *Barron*. On the next day viz. 16th *July*, *Taylor* applied by petition to the Chief Justice of this court, and gave bond with security, "conditioned that he should appear before this court at "the *September* term 1799, and surrender himself to prison, "in case on his said appearance he did not comply with all "things required by the act of 4th *April* 1798 to procure "his discharge; or if the proceedings should be stopt by information upon oath or affirmation, and in the trial of the "issue he should be found guilty, he should immediately "surrender himself to prison to be charged at the suit of "*Young*." *Taylor* was thereupon discharged out of custody; but did not apply for the benefit of the insolvent act at the *September* term. On the 28th *December* 1799 he did apply by petition to this court as an insolvent debtor, but took no further step to comply with the law. It seems clear that *Taylor* was liable to be charged in execution at the suit of *Young*, for not appearing in court in *September* term 1799, and complying with the terms of the law agreeably to the condition of his bond: but instead of charging him in execution, *Young* took out a *fieri facias* returnable to *September* term 1800, which in the month of *May* was levied upon

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goods as per inventory, a lot on Centre Square No. 2176, the two lots in question No. 1776 and 1777 on *Market* and *Twelfth*-streets, and a ground rent of thirty dollars, and the lands were condemned by inquisition on the 30th *August* 1800. On the 13th *December* 1800, *Young* by his attorney Mr. *Hallowell* issued an *alias ca. sa.* on his judgment, returnable the 27th *December* 1800, on which the sheriff arrested *Taylor* and had him in custody, and returned that service had been forbidden as to *Barron*. *Taylor* again applied, and on the 16th of the same month he gave a new bond with other sureties, conditioned as before, which was accepted by Mr. *Hallowell* and filed in court. On the next day he filed his petition in court with the proper schedules, and the court adjourned the consideration thereof to the 19th *January* 1801, with leave to add the names of two creditors to his list; and finally he was discharged by the court on complying with the terms of the act of 4th *April* 1798, and *Nathan Baker* was appointed assignee. Afterwards, upon a *venditioni exponas* returnable to *December* term 1806, the ground-rent of thirty dollars was sold to *Young* for two hundred and eighty dollars; and upon an *alias venditioni exponas* to *July* term 1808, the two lots in question were also sold to him for 1050 dollars, and a deed having been executed therefor, this court are called upon to receive the sheriff's acknowledgment thereof.

On this statement of facts, it appears that *Young* elected his remedy in the first instance against the person of *Taylor* to *September* term 1799, who was thereupon in custody, and having forfeited his bond by not complying with the terms of the law, he was liable to be charged in execution at the suit of *Young*. It seems highly questionable whether, under the discharge of *Taylor* by the *Chief Justice*, he could withdraw his *ca. sa.* and issue a *feri facias* to *September* term 1800, without the sanction of the court. But while the *feri facias* was in full operation, he certainly could not legally proceed to arrest the body of his debtor upon a *ca. sa.* A plaintiff may take out one execution against the body of a defendant, and another against his goods at the same time, but both cannot be served. The cases adduced on the argument fully shew this; and it is admitted on both sides, that issuing of the *alias ca. sa.* was erroneous, though they differ in one particular, whether it

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was merely *void*, or only voidable. There can be no doubt but that *Taylor* might have avoided it by writ of error to another tribunal, or by motion to the court. But the question is, whether *Taylor* having submitted thereto, and the proceedings on his ultimate discharge being founded thereon, it is competent to *Young* at the distance of nine years to annul his own act, and thus remove an obstacle to his *feri facias*, to the manifest injury of strangers to his proceedings? It is not necessary for us to determine in this stage of the business, whether the court would interfere on the application of *Young* to set aside the *alias ca. sa.* It is sufficient for us to decide, that upon inspection of our records as they now appear, the *alias ca. sa.* being a continuance of the original *ca. sa.*, and the *feri facias* having issued pending the operation of the *ca. sa.*, the *fi. fa.* was irregularly issued, and on the motion of *Taylor* would then have been set aside, and necessarily must now be set aside. Such is the irregularity of the proceedings in our view of the case, that we do not deem ourselves warranted under such circumstances to receive the acknowledgment of the sheriff's deed.

Mr. *Young* is not precluded by our decision from trying the title of his adversaries. An action may be instituted in the name of Mr. *Baker* the assignee under the acts of insolvency; or, if his counsel shall judge it to be most advisable, he may endeavour to make his proceedings more regular, and then, by a purchase at another sheriff's sale bring the suit in his own name.

We forbear expressing our sentiments on one point warmly pressed by Mr. *Rawle*. Whether a sale of lands under a later judgment can in any degree affect the lien of a prior judgment; whether such first sale can vest the title of the lands in a purchaser, so that the same cannot be again sold under a prior judgment, being considered as analogous to the sale of goods in *England* under a later execution; or whether any subsequent acts of the oldest judgment creditor, such as the receipt of a part of the purchase money in discharge of his debt upon a sale under a third judgment, will take away all recourse to the lands from the intermediate judgment creditor, are questions of much public moment, which deserve great consideration, but which it is unnecessary to decide at present. It is sufficient to state that differ-

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ent opinions have been entertained by professional gentlemen of great respectability on these points, and that it will be time enough to determine them when they come directly before us. I again repeat that we say nothing of the title to these lots of ground; but we are fully satisfied on the grounds of irregularity and abuse of the process of this court, that this sheriff's deed should not receive the sanction of our court.

Acknowledgment refused.

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Philadelphia,
 Wednesday,
 January 3.

HAYDEN and CASH against ADAMS, assignee, &c.

IN ERROR.

Upon the plea of *comperuit ad diem*, although it is by consent made an issue of fact, the acceptance of a plea and going to trial in the original action, do not entitle the bail to a verdict. Their only mode to take advantage of a waiver, is by application to the court.

THIS was a bail bond suit, brought by Adams to September term 1805 in the Common Pleas of Philadelphia county.

The declaration was filed in the original action in November 1805; and in March 1806, a docquet entry was made in this suit, that the plaintiff's attorney agreed to the filing of bail in the original, upon payment of costs in this. In the same month the general issue was pleaded in the original, and in January 1807 the cause was tried, and a verdict obtained by the plaintiff. The plea of *comperuit ad diem* was then entered in this action, and the issue upon it was tried by a jury.* On the trial of the cause, the defendant's counsel requested the court to charge the jury, that the filing a declaration, accepting a plea, joining issue, and taking a verdict in the original action, were conclusive evidence to prove a waiver of special bail, and the acceptance of a common appearance, and that they were a bar to the plaintiff's action. But the court refused, and sealed a bill of exceptions.

Milner for the plaintiffs in error, said it had been conceded by the court below, that the proceedings in the original action would have amounted to a waiver of special bail, but for the entry on the docquet in March 1806. That this entry was

* This was said to be by consent.

not an agreement, but merely the consent of the plaintiff's attorney to an act, which the defendants did not choose to perform, and therefore it did not affect the general principle. That it was in the power of the plaintiff to accept the defendants' appearance, or to insist upon bail; taking a plea and proceeding to trial admitted the defendants to be in court, and to be in a condition to plead and try, and this was accepting a common appearance.

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S. Levy for the defendant in error insisted, that inasmuch as the bail were liable for debt and costs when the entry was docketed, the plaintiff having then lost a trial in the original suit, *Orton v. Vincent (a)*, it could be considered in no other light than as an agreement by the defendants' attorney for his clients' benefit; and the acceptance of a plea immediately after the agreement, confirmed this construction. That the principle of waiver did not however apply to this case, as the bond was put in suit before the plea was entered, and the bail was fixed; and that at all events the waiver was not a bar under the issue of *comperuit ad diem*, but the defendants' only remedy was by motion to the court. *Caton v. M'Carty (b)*.

TILGHMAN C. J. The court are unanimously of opinion that judgment should be affirmed. The bail bond was forfeited and put in suit, before the implied waiver by accepting a plea took place; and if the defendant was desirous to take advantage of it, he should have applied to the court below by motion, to set aside or stay proceedings in the bail bond suit, when justice might have been done according to the circumstances. We must not be understood however to give any sanction to trying matter of record by a jury; but it having been by consent, we do not think it necessary in this instance to notice it.

Judgment affirmed.

(a) *Cowp.* 71.

(b) 2 *Dall.* 141.

1810.

Philadelphia,
Saturday,
January 6.

GIRARD against GETTIG.

IN ERROR.

The refusal of the court to order a nonsuit, is no ground for a bill of exceptions.

UPON the trial of this cause in the Common Pleas of *Philadelphia* county, *Girard* the defendant below moved for a nonsuit upon matter of law, which the court refused to order. He then produced his evidence, and in the end requested the court to charge that the plaintiff could not recover, which was also refused; and a bill of exceptions was sealed upon both points.

The argument in this court by *C. J. Ingersoll* for the plaintiff in error, *Shoemaker contra*, and the decision thereupon, turned so much upon the circumstances of the case, without involving any disputed point of law, that it is unnecessary to give them in detail. But in delivering judgment,

TILGHMAN C. J. stated the opinion of the court upon the first exception as follows.

As it seems to be growing into a custom, to take an exception, because the court below would not order a nonsuit, it may save future trouble of that kind to declare our opinion, that such exceptions cannot be sustained; because it is out of the power of the court to order a nonsuit against the consent of the plaintiff, who may refuse to enter it, and insist on taking the verdict. This is no injury to the party who wishes the court's opinion; because he may always prepare the particular point on which the opinion is desired, and the court is bound to give it.

Judgment affirmed.

1810.

Philadelphia,
Saturday,
January 6.

The Commonwealth against CARMALT.

THE defendant was indicted in the Quarter Sessions of *Montgomery*, for having, by colour of being gatekeeper of the Chesnut-Hill and Springhouse Turnpike Company, unlawfully demanded and received of one *Aaron Keyser*, the sum of four cents, for opening the gate of the said company, and permitting him to pass with a sled and two horses.

Two detached pieces of land occupied as one farm, are within the meaning of the first section of the act of 17th March 1806, which prohibits certain turnpike companies from taking tolls from any person when passing from "one part of his farm to the other" along the turnpike road.

Upon the trial of the indictment before the Chief Justice on the *Montgomery* Circuit in June 1808, the jury found a special verdict to the following effect: That *Keyser* resided in *Flour-town* on the Chesnut-Hill and Springhouse Turnpike Road, and had there six acres of ground which he farmed; that he had another lot of ten acres at the distance of a quarter of a mile from his residence, and about sixty rods from the turnpike road, which he also farmed, on which there was no building but a hay barrack, and to which he could not go but by the turnpike, and through the gate kept by the defendant. That the toll stated in the indictment, was taken for passing through the said gate twice or oftener from one of the said lots to the other, and that permission to pass was refused until the toll was paid. That the Chesnut-Hill and Springhouse Turnpike Company had taken the benefits of the act passed the 17th March 1806, entitled &c., and had acceded to the terms of the said act. [By which, under the proviso to the first section, 7 *St. Laws* 528, they relinquished "their right of taking tolls from any person, when passing from one part of his or her farm to the other, along the said road."] That the said two separate lots were occupied by the said *Aaron Keyser* as one farm, and were so occupied at the time the toll was taken. But whether on the whole matter &c.

It was agreed by counsel, that the questions arising upon the special verdict should be argued in bank, and that judgment should be entered in the Circuit Court, according to the opinion of this court.

Hemphill for the commonwealth, stated the question to be, whether *Keyser* at the time the toll was exacted, was passing

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from one part of his farm to the other; and he insisted, that after the finding of the jury, that the two lots were occupied as one farm, the defendant had no course left but to deny the possibility of two detached pieces of land being parts of one farm; a position equally irreconcilable with the meaning of the word, and the intention of the legislature. The strictest technical signification of "*farm*," is comprehensive enough to embrace distinct parcels of land. "The lessee" says *Plowden*, "may be called the farmer of every thing that he has on lease; and that which he holds may as to him be called his farm." *Wrotesly v. Adams (a)*: *Jacob*. "*Farm*." This is also the popular meaning. A farm in common acceptation consists of a variety of objects, as a messuage, orchard, meadow, woodland, arable and the like, to which contiguity is in no degree essential. If a farmer were to sell the middle field of three which were contiguous to each other, would the exterior fields cease to be parts of the same farm? But the legislature intended the exemption from toll for such a case as *Keyser's*, as much as for any other. The act of 1806 was designed to confer upon certain companies the privileges of the Lancaster Turnpike, and to make them subject to the like disabilities. Now, by the act of 17th April 1795, 3 *St. Laws* 751, the Lancaster Turnpike Company are prohibited from taking toll of persons living on or adjacent to the road, who may have occasion to pass on the ordinary business of their farms, and have no other convenient road; and the last act should therefore have a liberal construction, to make it correspond with the first. It is well known that almost all the inhabitants of villages on the turnpikes have what are called outlots, which they farm; and it may be presumed that the principal intent of the provision, was to exempt these people from the vexation and expense of repeated tolls.

T. Ross for the defendant answered, that the finding of the jury was not so conclusive as was supposed; for they had not found that the two lots were parts of one farm, but that they were occupied as one farm, which was a very different thing. A man might purchase a piece of land at one end of a turnpike, and occupy it as one farm with a piece at the other

(a) 1 *Plowd.* 195.

end, and thus travel toll-free the whole extent. They must not only be occupied as, but in fact be, one farm, to come within the law. The questions then are, whether two lots, situated according to the verdict, are one farm, within the legal meaning of the word, and the intention of the legislature. What may be its meaning in relation to the lessee, is one thing; it may, according to the quotation from *Plowden*, comprehend every thing he leases, however disjointed; but this comprehensive meaning is given to it, only in the case of a lessee, which *Keyser* does not appear to have been. 1 *Cruise* 244. 3 *Cruise* 307. When the thing is spoken of *per se*, *Plowden* says, it is a collective word, consisting of divers things *gathered in one*, as a messuage, lands &c.; that is, as I understand it, lying in contiguity. If *Keyser* had devised his farm in *Flourtown*, is it supposed that the other lot would have passed? The legislature could not have intended an exemption in the present case, because it would lead to perpetual frauds upon the company. Their object was solely to prevent the arbitrary erection of gates, from becoming a restraint upon free access to every part of the same body of lands; and it might be supposed, from the ordinary size of farms, that it would be no great injury to the company. But if lots separated from each other a mile, are one farm, so they may be if separated ten; and then the landholder has a most unreasonable privilege, at a great expense to the company. The act of 1795 is out of the question. The case turns exclusively upon the terms in the act of 1806.

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TILGHMAN C. J. By the act of the 17th *March* 1806, certain privileges were given to the Chesnut-Hill and Springhouse Turnpike Company, provided that they should not have the benefit of that act, unless they relinquished their right of taking tolls from any person, "when passing from one part of his or her farm to the other along the said road." After the company had accepted the benefit of this act, the defendant took the toll for which he was indicted. It is now made a question whether upon the finding of the jury, *Keyser* was passing from one part of his farm to the other.

The defendant's counsel have endeavoured to shew, that *Keyser* had two separate farms, and was passing from one

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of them to the other. In order to support this position, it must be shewn, that it is impossible for two parcels of land, not contiguous, to be parts of one farm; for the jury have expressly found that they were occupied as *one farm*. Books have been cited to shew the meaning of the word *farm*. It does not appear that the *English* affix a meaning to that word different from our idea of it. But if they did, it would signify nothing. We must understand it as it is generally understood in *Pennsylvania*. By a farm we mean an indefinite quantity of land, some of which is cultivated. Most farms contain parcels of land applied to different purposes. Some are used for the cultivation of grass, some of grain, and some remain in wood. It is very common for the proprietors of farms to have a piece of wood land, not contiguous to the place of their residence, but appurtenant to it. I can see no reason why those different parcels of land should not be reckoned as one farm; nor has any authority been cited to the contrary. Suppose a man to have a farm consisting of three fields lying on the turnpike road, and to sell the middle field, so that the two remaining ones shall not be contiguous. Do they therefore cease to be one farm? I am satisfied that there are many cases where a farm consists of detached parcels of land, and that farms of this kind are within the words and meaning of the act of assembly. The jury then having found that these different parcels were *occupied as one farm*, which was a matter of fact, proper for them to decide, I am clearly of opinion that the taking of toll was illegal, and that judgment should be entered for the commonwealth.

YEATES J. gave no opinion, not having been present at the argument.

BRACKENRIDGE J. concurred with the Chief Justice.

Judgment for the commonwealth.

1810.

SHOEMAKER and BERRETT *against* SMITH.Philadelphia,
Saturday,
January 6.**E**XCEPTIONS to a report of referees.

On the 14th of *April* 1801, the plaintiffs, who were insurance brokers, effected insurance for the defendant on the sloop *Susannah*, at and from *St. Croix* to *Philadelphia*, and also on goods laden or to be laden on board her, at a premium of thirty-three and a third per cent. The premium, which amounted to nine hundred dollars, not being paid when it fell due, the present action was brought to recover it; and under a rule of court, all matters in variance were referred to "*Stephen Girard* and *Joseph Ball*, and to such a third person, in case they could not agree, as they might appoint, and then the award or report of the three or any two of them to be final."

If an insurance broker pays the premium to the underwriter after notice from the assured, before the premium was due, that the risk never commenced, he cannot recover it from the assured, and turn him round to a suit against the underwriter for a return.

No exception which does not appear wholly upon the face of the report, can be taken after the four days have expired.

Under this rule the following report was made. "We *Stephen Girard* and *Joseph Ball*, referees in the above rule of court named, having appointed *James C. Fisher* to assist us in determining all matters in variance between &c., and having heard the parties, and *James C. Fisher* having joined us in the reference, and all of us having carefully examined all the papers and documents submitted to us, do award and report that there is due from the defendant to the plaintiffs, the sum of one hundred and fifty-three dollars, and twenty-eight cents." *S. G., J. B., J. C. F.*

To this report the plaintiffs in due time filed the following exceptions: 1. That the referees proceeded on a plain mistake both in law and fact, inasmuch as the plaintiffs' claim was founded on the sum of nine hundred dollars, by them advanced to and settled in account with the underwriters on two policies on the *Susannah*, *Calquhoun*, and cargo, on a voyage from *St. Croix* to *Philadelphia*, for which the defendant thereby became indebted to them; whereas the referees have deducted therefrom a sum on account of a return premium, which the defendant may have been entitled to claim from the said underwriters, but not from the plaintiffs. 2. That the report should have been made in favour of the

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plaintiffs for the full amount of their account, being nine hundred dollars, as above, and three dollars for policies and stamps, and not for the smaller sum which the referees have found.

Upon the examination of Mr. *Ball*, one of the referees, and an underwriter of great experience, he stated to the court, that the claim for the entire amount of premium was made by the plaintiffs, upon the ground that they had paid it to the underwriters, a fact however which the referees did not consider; because, on the 16th of June 1801, a month before the premium was due, a letter prepared by *Shoemaker* and signed by the defendant, was addressed to the plaintiffs, informing them that the goods would not be shipped, and requesting them to apply to the underwriters to cancel the policies, upon paying a certain part of the premium, which included something for the short risk on the vessel. That it was the practice for the assured to give his note for the premium to the broker, and for the broker to pass the premium to the credit of the underwriter immediately on making insurance; but that it was not payable until the credit on the premium expired. That the broker guaranteed the premium to the underwriters, for which he received five per cent.; and that when a return premium was demanded, the broker got the underwriters to indorse on the policy an order to return it. That it had been the practice about twenty-eight years for the broker to guaranty the premium, and that he, and not the underwriters, usually brought the action for it; but that the referees thought it was the duty of the broker to obtain the order for a return, being for this purpose the agent of the assured, or at least to debit the underwriters after the notice received, and leave them and the assured to contest the matter between them. They therefore took into consideration what the underwriters ought to have returned, and what they were entitled to retain according to the practice in this city for the short risk on the vessel, and allowed it to the plaintiffs.

Mr. *Ball* stated further, that Mr. *Girard* and himself had called in Mr. *Fisher* as a third referee, before they had communicated their opinions to each other; and that Mr. *Fisher* had obtained his information from the referees and the written documents; but he did not hear the parties, nor did

Mr. Ball believe that the parties were informed of his being called in.

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SMITH.

After this examination a third exception to the report was taken at the bar, viz. that Mr. Fisher was called in, and proceeded without hearing the parties, and without their having notice.

Rawle for the plaintiffs. By the usage both in *London* and *Philadelphia*, the broker alone is debtor for the premiums to the underwriter, the latter giving credit to the broker, and the broker to the assured. *Parke* 34. 6th ed. It is also a part of the usage for the broker to credit the underwriters in account as soon as the insurance is effected, and to guaranty the payment; so that he admits the premiums to be received by him, and can make no defence against the underwriter's claim. The broker therefore being a middle man, with whom a positive contract is made by the assured to pay the premiums, and who on his part positively engages to pay to the underwriters, without entering into any other contract in relation to the insurance, no action lies against him for a return premium. It does not lie, because he makes no engagement to return it, and because by the usage he is under an unconditional engagement to pay it over. If no action lies against the broker for a return, it follows that it cannot be deducted from his claim upon the assured. The remedy of the latter is against the underwriter; and so are always the suits for a return in *England*. To make the broker responsible, is in fact to make him insure the solvency of the underwriter as well as of the assured; for upon the principles of the award, if he had paid the premium to the underwriter who had then failed, he must still pay it back, or at least he could never recover it.

The third exception appears upon the face of the proceedings, and is therefore in time, though taken at the bar. *Buckley v. Durant* (a), *Kent v. Elstob* (b). The award expressly states that *Girard* and *Ball* heard the parties, but that *Fisher* merely examined the documents; and it is a settled rule that if the umpire examines papers or witnesses in the

(a) 1 *Dall.* 129.(b) 3 *East* 14.

1810. absence and without the knowledge of the parties, the award is bad. *Falconer v. Montgomery* (a), *Passmore v. Pettit* (b).

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M. Kean for the defendant. Whatever may be the agreement between the broker and the underwriter, it cannot affect the rights of the assured; their practice is a private rule, and not a commercial usage. But be this as it may, the evidence does not shew even a practice against a return by the broker. In the first place, there is no absolute engagement by the broker to pay the underwriter. He guaranties the solvency of the assured, but he does not promise to pay at all events. He is to pay only when the premium shall fall due; and if before the expiration of the credit, he is informed that no risk has been run, with what propriety can the underwriters insist upon recovering it from him, or he refuse to deduct it from his claim against the assured? In the next place the broker is the agent of both parties as to the premium. It is his duty, and so is the practice, to adjust the return; and it is not to be endured, that after receiving notice that the premium is not due, he shall pay it to the underwriters, and then recover the whole from the assured. It is against natural justice, that the defendant shall pay to the agent what is not due to the principal, and then be put to a suit against the principal to recover it back. It cannot be so in *England*. If the premium has been paid after it has become due, and without notice, the case is varied; but until that takes place, the broker is the very person to settle the return.

The third exception is too late. It does not appear on the face of the award, that *Fisher* did not hear the parties; but if it did, still something more should appear there, that it was against the consent of the parties, or without their knowledge. The actual state of the fact, *dehors* the award, is of no consequence. Every thing that an exception at this time embraces, must appear clearly on the face of the award. In *Falconer v. Montgomery*, and in *Passmore v. Pettit*, the exception was taken within four days; and in *Buckley v. Durant* the objections on the face of the award were wholly matter of law.

(a) 4 Dall. 232.

(b) 4 Dall. 271.

TILGHMAN C. J. delivered judgment.

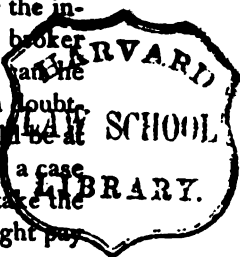
The exception filed by the plaintiffs to the award of the arbitrators, is founded upon a supposition that the broker is bound at all events to pay the premium to the underwriters, even though it is discovered before the time when it is payable, that it is a case in which no premium is due, because the risk never commenced. It is the custom, say they, for the broker to credit the underwriter for the amount of the premium immediately on signing the policy. The broker guarantees the premium, and collects it from the assured, who in this respect has nothing to do with the underwriter, though if it be a case of return premium, it is to the underwriter only that he must look for restitution. This custom of the broker's guarantying the premium, in consideration of which he receives five per cent. from the underwriters, may be very convenient to both these parties; but the assured has nothing to do with it, and they have no right to throw an inconvenience on him for their own benefit. A credit is given for the payment of the premium. Before the day of payment arrives, the assured finds that the underwriters never ran any risque, and therefore are not entitled to the premium. He warns the broker, who was his agent in procuring the insurance to be effected, not to pay it. If after this the broker does pay it, on what principle of law or justice can he demand the money of the assured? If indeed it was a doubtful case, it would be improper that the broker should be at the expense and hazard of defending a suit. In such a case he might call on the assured to indemnify him, and take the defence upon himself; and if he failed to do it, he might pay the money and recover it of the assured. But in the present case it is not alleged that the plaintiffs were under the least apprehension of suffering by the defendant. The arbitrators supposed that it was the duty of the plaintiffs after the notice they received from the defendant, to withhold the money from the underwriters, and endeavour to obtain justice for the assured; and in this we think they were right. The assured had a right to contest the matter before he paid his money, because in a case circumstanced like the present, the money could never be recovered of him. It is radically unjust that a man should pay money where no money is due, and then be put to his action to recover it back.

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In the course of the argument, the plaintiffs' counsel have made another exception, which was not taken within the time fixed by the rule of court. But this will not prevent their taking advantage of it, if it appears clearly on the face of the award. The exception is this. That Mr. *Fisher* who was called in by the two arbitrators first named, proceeded to consider and determine the matter in conjunction with them, upon a view of the papers and the information which he received from his colleagues, without hearing the parties. This is an objection not to be favoured in this stage of the business. It has been taken up at the bar, from which it is evident that the plaintiffs themselves did not think they were injured by this mode of proceeding. Let us see then how the matter stands on the face of the award. The language of the arbitrators is as follows. "We *Stephen Girard* and *Joseph Ball* having appointed *James C. Fisher* to assist us in determining &c. "and having heard the parties, and *James C. Fisher* having joined us in the reference, and all of us having carefully examined all the papers and documents submitted to us, do award &c." Now in the first place it does not appear quite clear that Mr. *Fisher* did not hear the parties, although I should rather incline to think he did not. But if he did not, it may be for any thing that appears, that the parties consented to his taking the matter up on the information he might receive from the papers explained by his colleagues. In such case it would be all right. The arbitrators were not obliged to say any thing in the award about hearing the parties; and as no objection on that score was made by the plaintiffs themselves, we ought rather to presume that if they were not heard, it was because they did not desire to be heard. It does not appear on the face of the award that Mr. *Fisher* went on to consider the matter in the absence of the parties, and without their consent. There is therefore no error in law in that respect. The opinion of the court is that the report be confirmed.

Report confirmed.

WIDDIFIELD and others against WIDDIFIELD.

1810.

Philadelphia,
Saturday,
January 6.

IN ERROR.

WRIT of error to the Common Pleas of *Philadelphia* county.

The existence of a written agreement of partnership between the defendants, does not preclude the plaintiff from proving a partnership by the actions or declarations of the parties.

This action was brought by *William Widdifield* the defendant in error, against *John Widdifield*, *William Turnbull* and *Anthony Morris*, the plaintiffs in error, as the drawers of a promissory note for four hundred dollars dated at *Lausanne* the 26th June 1806, and signed by *John Widdifield* with the firm of *John Widdifield* and company.

Upon the trial of the cause, the plaintiff, to prove that the defendants were partners under the firm of *John Widdifield* and company, produced a witness, who deposed, that before the partnership commenced, *Anthony Morris* and *William Turnbull* came to *Lausanne*, where the three defendants had an agreement drawn up of partnership between them, whether written or printed he did not know, as he had not seen it; but he knew there was such an agreement, because *Turnbull* and *Widdifield* told him so.

The counsel for the defendants thereupon objected, that, as it appeared by the plaintiff's evidence, that if any such partnership as he alleged existed, it was contracted by a written instrument, no parol proof of the partnership could be received; but the written instrument should be produced, or if in the possession of the defendants, notice should have been given to them to produce it; and as it was not produced, nor any notice given, the plaintiff had not maintained the issue on his part, and therefore they prayed a nonsuit. The plaintiff's counsel then gave a written notice at the bar to produce the agreement; and the court, without however regarding the notice, refused the nonsuit for reasons which are not material.

The plaintiff afterwards produced another witness to prove that the alleged partnership existed; and he was opposed upon the same grounds. But the court admitted the evidence, and the defendants took a bill of exceptions to the decision upon both points.

1810. Upon the argument in this court, various exceptions were taken to the record, and to the bill of exceptions; but the material question was the admissibility of the parol evidence.

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Upon this point *Hopkinson* and *Ingersoll* for the plaintiffs in error, contended, that as the partnership was shewn to depend upon writing, the writing itself was the best evidence; and therefore the plaintiff should have produced it, or have done what was equivalent, that is, given notice to the defendants. *Peake's Ev.* 99, 100. 3d ed. The question was not whether a partnership may not be proved without writing, but whether, when a writing is shewn to exist, and the plaintiff's action is derived from it, it is not the best evidence. In trover for a bill of exchange, no evidence of the contents can be given without notice to produce it. *Cowan v. Abraham* (a). In *Bucher v. Farratt* (b) it is stated to be the general rule, that where a written instrument is to be used as a medium of proof, by which a claim to a demand arising out of the instrument is to be supported, the instrument itself must be produced, or notice given to the opposite party; and there is no difference whether the instrument comes in by way of collateral evidence, or is the very deed upon which the action is founded. *Cole v. Gibson* (c), *Keely v. Ord* (d). The only exception to the rule is in criminal cases, where the notice to the defendant calls upon him to criminate himself. *The Commonwealth v. Messinger* (e). The moment it appears that the agreement referred to by the witness is in writing, no further account can be given of it by parol. *Hodges v. Drakeford* (f). In the present case, the article referred to might have been a limited partnership which did not authorize the note; or the note might have been signed after the partnership had expired by its own limitation, in which case it would not have bound *Morris* and *Turnbull*. *Lansing v. Gaine* (g). It cannot be objected with any plausibility, that the evidence was not offered to prove the contents of the agreement, because the very fact of partnership was part of the contents, and the witness in truth derived

(a) 1 *Esp.* 40.

(b) 3 *Bos. & Pul.* 146.

(c) 1 *Ves.* 505.

(d) 1 *Dall.* 310.

(e) 1 *Binn.* 273.

(f) 4 *Bos. & Pul.* 271.

(g) 2 *Johne.* 300.

his knowledge from the agreement. The plaintiff's counsel were it seems aware of this, by giving the notice at bar; but that can be of no avail, because it was not regarded by the court, and the rule requires a reasonable notice before the trial.

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Brown and Rush for the defendant in error, answered, that as the bill of exceptions did not set out the evidence which the last witness was to give, the question for the court was whether the fact of partnership could be proved by any parol evidence, after a written agreement was shewn to exist. The evidence was not offered to prove the contents, but to shew, from the acts and declarations of the defendants, that such a partnership existed, as warranted the signature to the note in question. It might not be the same partnership to which the writing referred; it might be more or less general; but if it was identically the same, still it was competent to the plaintiff to prove it by parol, because his action did not depend upon the writing, according to the rule in *Bucher v. Farratt*, but upon the fact, which might be proved *aliunde*, and because it was not intended to state a syllable of the contents. All evidence is according to the matter to which it is applied, and to the person against whom it is used. In *Radford v. M'Intosh (a)* the court held, that proof of the defendant having accounted with the plaintiff as farmer of the post-horse duty, was sufficient evidence of his being so, although he could not be so without an appointment by the lords of the treasury, or the commissioners of stamps. To the same point are *Bevan v. William (b)*, and *Radford v. Briggs (c)*. If the sheriff's warrant to his bailiff is to be proved, it must either be produced, or notice given; but in an action against the sheriff, his indorsement of the bailiff's name on the writ, is sufficient evidence that he was authorized. *Blatch v. Archer (d)*, *The Queen v. Chapman (e)*. Cohabitation as man and wife is sufficient proof of marriage to charge the husband with his wife's lodging; *Car v. King (f)*; and in like manner, representations by the defendants would be sufficient to charge them as general partners, although arti-

(a) 3 D. & E. 632.

(c) 3 D. & E. 637.

(e) 6 Mod. 152.

(b) 3 D. & E. 635. note.

(d) Comp. 63.

(f) 12 Mod. 372.

1810. cles of partnership or an agreement existed, making them
 WIDDIFIELD partners only to a special purpose. *De Berthon v. Smith* (a).
 v. Their confessions and acts are sufficient for our purpose. If
 WIDDIFIELD. however the object was to prove the contents, we were en-
 titled to do it for two reasons; first because we were not
 bound to give notice to the parties to produce a private and
 secret instrument in their keeping, and to which we were
 strangers; secondly, because reasonable notice was given.
 The defendants were prepared by the declaration for the
 evidence of partnership; and they must therefore have been
 ready to produce their own agreement on the shortest notice.

TILGHMAN C. J. In this case an exception was taken to
 two opinions of the Court of Common Pleas given in the
 course of the trial. The action was on a promissory note,
 signed by *John Widdifield* and company; and the question
 before the jury was, whether *John Widdifield*, *William Turn-*
bull and *Anthony Morris* were joint partners under the firm of
John Widdifield and company. The plaintiff produced *George*
Widdifield as a witness, who swore that "the three defen-"
 "dants had an agreement drawn up of partnership between"
 "them; but whether written or printed he did not know, as"
 "he had not seen it; he knew there was such an agreement,"
 "because *William Turnbull* and *John Widdifield* told him"
 "so." After this evidence was given, the defendant's coun-
 sel insisted, that as the plaintiff's witness had proved, that if
 there was a partnership it was contracted by a written instru-
 ment, no parol proof could be received of the partnership,
 but the instrument itself should be produced to the jury, or
 if in possession of the defendants, notice should have been
 given to them to produce it; they therefore prayed that the de-
 fendant might be nonsuited. But the court refused to non-
 suit him, and gave their reasons. It is unnecessary to give
 any opinion concerning the reasons assigned by the court,
 because whether they are good or bad, I think they were
 right in refusing the nonsuit. This court have declared their
 opinion in the case of *Girard v. Gettig* (b), that the plaintiff's
 counsel cannot be nonsuited against their consent, but may in-
 sist on taking the verdict. If it is wished to have the opinion

(a) 1 Esp. 29.

(b) Supra 234.

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of the Court of Common Pleas examined on a writ of error, it will be necessary, instead of asking for a nonsuit, to state some specific point, and pray their opinion on it to be given in charge to the jury. In the case before us, it would have been altogether improper to nonsuit the plaintiff, because he might have other evidence to offer, independent of the written articles of partnership; and indeed from the subsequent proceedings, it appears that he had. The record goes on to state, that "after the court had refused to order a nonsuit, the plaintiff produced a witness to prove that the partnership existed." The defendant's counsel objected to the admission of this testimony; but the court declared that it should be received. The reason relied on by the defendant's counsel, for rejecting the testimony is, that parol evidence is inadmissible to prove the contents of a written instrument. But granting this principle to be in general true, it by no means follows that the testimony offered should have been rejected. It does not appear that there was any intention to give evidence of the contents of the articles of partnership. A partnership may be proved by the declarations and actions of the parties. Suppose the articles had been produced, and contained an agreement for a special partnership. Will it be said, that the partners might not afterwards form a general partnership by parol? Might not evidence be given of their confession of a general partnership, subsequent to the articles, or of their acting in such a manner as was inconsistent with any thing but a general partnership? How are the world to know any thing about instruments of writing made in secret between persons in trade? I believe it the general practice to have written articles of partnership; yet, amongst the numerous actions brought against partners, I have seldom known the partnership proved by production of the writing. In what manner the witness of the plaintiff proved the partnership in this case, does not appear. If the defendant's counsel thought it material, they might have specified it in the bill of exceptions. We must take the record as we find it. It is not said there that the testimony went to prove the contents of any writing, and we cannot presume that it did. In order to reverse the judgment it must appear with certainty, that the opinion of the court was wrong. I cannot

1810. say that it does appear so, by this bill of exceptions. I am
 therefore of opinion that the judgment should be affirmed.
 WIDDIFIELD
 v. YEATES J. and BRACKENRIDGE J, concurred.
 WIDDIFIELD. Judgment affirmed.

Philadelphia,
Saturday,
January 6.

Case of the SCHUYLKILL FALLS' ROAD.

It is not necessary that an appointment of viewers &c. to lay out a road, should state that they are "freeholders and inhabitants near where complaint is made for want of a road," although the act of assembly requires them to be so. This court will presume that the Quarter Sessions have made the appointment according to law.

A reference to the improvements through which a projected road is to pass, need not be made in the report of the viewers &c. They may be shewn in the plot or draft.

The sessions have power to

order a re-review, although the law does not expressly authorize it.

This court does not hear evidence upon a *certiorari* to the Quarter Sessions to remove the proceedings in a road cause.

If it appears by the report, that a county commissioner attended the view, it is sufficient to shew that notice was given to the commissioners, agreeably to the standing order of the sessions.

CERTIORARI to the Quarter Sessions of *Philadelphia* county, to remove all petitions, orders, &c. upon a certain application by *Samuel Wheeler* and others, trustees of the Schuylkill Falls' Bridge, for a road from the western end of the said bridge, towards the old *Lancaster* road, near the seven-mile stone.

The petition for the road was presented to the Quarter Sessions at the *June* sessions 1808, when six viewers were appointed, without specifying in the appointment *their place of residence or that they were freeholders*; and their report was made to *September* term following, stating that they had viewed the ground in the presence of two county commissioners, (a standing order of the sessions requiring two days' notice of the time and place of such views to be given to the commissioners,) and that they had proceeded to lay out a public road by the courses and distances mentioned in the report, which they were of opinion should be of the breadth of fifty feet. To this report was attached a plot or draught of the road, shewing the face of the adjacent country, and the improvements through which the road would pass.

At the *September* sessions the court made an order of review, and appointed six reviewers with the same omission as before, who made a report to *December* sessions 1808, stating the attendance of the commissioners, and altering

the courses of the road, a draught of which and of the improvements was in like manner attached.

At the *December* sessions an order of re-review was made upon the petition of the trustees above mentioned, and six re-reviewers appointed as before, who at *March* sessions 1809 reported their approbation of the road first returned, and that they had proceeded to lay it out, one of the county commissioners attending, according to the courses and distances contained in the report. A similar draught was also attached to this report; and thereupon the court at the same sessions confirmed the report of the re-reviewers, ordered the road to be entered of record, and directed the supervisors to open it of the breadth of forty feet.

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21 SC 622

McKean and *Levy*, on behalf of *George Aston* through whose farm the road was laid out, took seven exceptions, upon which they moved to quash the proceedings of the court below.

1. That the viewers and re-reviewers were not appointed from the inhabitants near where the complaint was made for want of the road.

2. That the viewers and re-reviewers had made no reference to the improvements through which the road was to pass.

3. That the court granted a re-review, whereas by law the court had no power to grant it.

4. That the court approved and confirmed the road at the same sessions to which the report of re-reviewers was made; whereas it could not be entered on record and become a road, until the court next after that to which the report was made.

5. That the court of Quarter Sessions ordered that notice should be given to the commissioners of the county of *Philadelphia*, of the time of the meeting of the viewers, and it did not appear by the record that such notice was given, or that the said county commissioners attended at the said re-review.

6. That it was not stated that the viewers were freeholders, or that the reviewers were freeholders, or that the re-reviewers were freeholders.

1810. 7. That the said road was approved, confirmed, and ordered, when it should have been disapproved, rejected, and vacated.

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1. and 6. Upon the first and sixth exceptions they argued, that the powers of the Quarter Sessions in road causes, being in derogation of the common law, and affecting the property of individuals, should be strictly pursued according to the act of assembly, and should so appear upon the face of the proceedings. In this subordinate office the sessions stand upon the footing of an inferior and limited jurisdiction. Their proceedings are not to be supported by intendment, but by their conformity to the statute upon which they are founded, which must be plainly set out. *The King v. Manning* (a), *The King v. Mayor of Liverpool* (b), *The King v. The Inhabitants of Stroud* (c), *The King v. Croke* (d), *Ferrescue* 327. The act of 6th April 1802, 5 St. Laws 178, requires the court to appoint "six discreet and reputable freeholders, of the inhabitants near where complaint is made of the want of a private or public road or highway." The appointment does not pursue the words of the law, nor does it state the fact of freehold and inhabitancy; and the truth is, that all the viewers live several miles from the road, and one of them is not a freeholder. If this appeared on the face of the appointment, the court would certainly quash the proceedings. We should therefore either be permitted to give evidence upon the *certiorari*, which we agree is not the practice in cases like this, or the strict rule should be adopted. There is no third course left, but to wink at every irregularity committed by the sessions.

2. The second exception is not answered by the draught. The law requires references to the improvements, in addition to the draught, that the court when called upon to approve, may know in what manner orchards, meadows, plough land and the like will be affected. It is obvious that the draught must be much less definite than a written report; but it is sufficient for us that the act requires both.

3. The 22d section authorizes a review, but not a re-

(a) 1 Burr. 377.

(b) 4 Burr. 2245.

(c) 1 Stra. 315.

(d) Comp. 26.

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review, and the court have therefore exceeded their authority. Both reviews and re-reviews were formerly matter of practice only. 1 *Dall.* 11. But the act of 1802 was intended to incorporate all parts of the practice which it was thought proper to retain, and it cannot be exceeded.

4. The fourth exception is waived.

5. The attendance of the commissioners is not evidence of notice. It might have been casual, and without a knowledge of the object. The order required two days' notice to give them an opportunity to make objections; and *The King v. The Mayor of Liverpool* is decisive that the notice should be stated.

Sergeant and Morgan contra. 1 and 6. The first and sixth exceptions are founded on a mistake. The Quarter Sessions is not a court of limited jurisdiction, in the sense in which those terms are used in the cases referred to. It is a court of record established by the constitution; and although limited, as this court also is as to the objects of jurisdiction, yet its powers are general in all cases of which it takes cognizance. The authorities cited apply only to courts appointed by act of parliament for special purposes and with limited powers, or to cases of convictions, followed by a penalty, and not to orders like the present. If they were held to govern this case, it would be necessary for the sessions to set forth even the qualifications of jurors. This court has however repeatedly held, that where no irregularity appears upon the proceedings of the sessions, none is to be presumed; and a contrary doctrine would vacate every road that the sessions have ever confirmed. The act of 1700, 1 *St. Laws* 16, under which most of the roads in this part of the commonwealth have been laid out, directed the appointment of six sufficient *housekeepers* of the neighbourhood inhabiting *near* &c.; but the appointment never set out the qualification. Not an instance is to be found in a century. If the viewers are unqualified, the objection should be made in the sessions. Asking for a review did in fact admit that the proceedings on the view were formal.

2. The second exception is not founded in fact. The draught sets forth the improvements with greater certainty, than a written report could possibly do; and the act does not

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require both, but by the position of the sentence evidently demands that the references should be made in the draught. If however neither report nor draught makes any reference to improvements, this court must presume that there are none.

3. By the 1st and 23d sections taken together, the sessions are to direct reviews as often as occasion shall require. After the first review, every view is a re-review, and therefore comes within the authority of the court. A re-review is however as much matter of practice since the act, as a review was before, and has become according to 1 *Dall.* 11. as much a matter of right. But suppose the re-review to have been irregular, it is merely surplusage. The re-reviewers approve the road laid out by the viewers; and that is the road which the sessions have confirmed.

5. The notice to the county commissioners is not required by law. It is an order of the court below; and this court is not to vindicate a rule, which the court who made it did not think proper to enforce. But the object of the rule was only to inform the county officers of intended roads, that the county might not be unnecessarily burthened; and the attendance of the commissioners is decisive evidence that the object of the rule was attained. They do not, and never have objected to the road.

YEATES J. delivered the court's opinion.

The counsel of Mr. *George Aston* who opposed this road, have taken six specific exceptions thereto; each of which shall be considered.

We will follow the example of the counsel, and observe on the first and sixth exceptions together. The act of the 6th of *April 1802*, 5 *St. Laws* 178. directs that "on a petition for a public or private road, the justices of the Court of Quarter Sessions of each county shall have power in open court, to order and appoint six discreet and reputable *freeholders*, of the *inhabitants near* where complaint is made for want of a road, to view the ground proposed for the said road &c." It has been objected, that the persons appointed as viewers and re-reviewers of this road, were not *freeholders* and *inhabitants near* the road, in *fact*; and that it is absolutely necessary that it should appear on the face of the proceedings, that

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they possessed such qualifications. How that fact really is, we have no mode of ascertaining, unless by hearing testimony thereon, which we think would be highly irregular and improper. This we know, that we cannot collect from the proceedings; that the persons so appointed were not *freeholders*, and *inhabitants near the road*. If such had been the case, it would clearly be error, because we should be bound to pronounce it a deviation from the law. We admit the rule to be, that inferior jurisdictions must appear to have pursued their authority strictly, and that no intendment shall be made in their favour; but we think it not applicable to the court of Quarter Sessions of the Peace established by the 5th article of our constitution. The law will not intend that they have committed an error, when acting on a subject clearly within their jurisdiction; but will presume in cases before them, which admit of presumption, *omnia esse rite acta*. Should the principle on which this exception is founded be sustained, we much fear, that almost every road in the state, laid out by the sessions, would be subject to reversal. The old act of 1700, (1 *St. Laws* 16.) provides that the justices of each county court shall order and appoint six sufficient *housekeepers* in the *neighbourhood, inhabiting near* the place where the complaint is made for want of a road, to view &c. Should the confirmation of the present road be vacated on the grounds above urged, consistency of decision must oblige us to reverse the proceedings of the county courts under the act of 1700, when it does not appear on the face thereof, that *housekeepers* of the *neighbourhood inhabiting near* the road have been appointed as viewers. The several members of this court do not recollect a single instance in all their experience, wherein these qualifications of the viewers *appear* on the record. The exception strikes us as being perfectly novel.

2. The second exception is, that the viewers or the reviewers have made no reference to the improvements, through which the road passes. But this is not warranted by the fact. The plot or draught of the road annexed to the returns, does refer to the improvements, with much seeming correctness; and it appears to the court that such references should be on the draught, by the plain words of the act. Where different courses and distances have been returned by

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 FALLS' ROAD.

several sets of men, the sessions are enabled on a view of the draughts and improvements laid down therein, to contrast them and determine on the shortness of the distance, and injury to private property, which seems to be the object the legislature had in view by this provision. The compensation to the individual for the injury done to his private property, comes before other viewers for their decision.

3. We see no weight in the exception, that the sessions had no power to grant a re-review. It is a second review directed for the information of the minds of the court. Many cases may occur, where from local circumstances it may be difficult for the court to form their judgment on the relative merit of two different returns. The members of the court may suppose that the viewers and reviewers possessed equal disinterestedness, respectability of character, and knowledge of the ground through which the road passes; and their minds may balance between them. What more proper medium of information could be pointed out in such a case, than the view of other discreet and reputable men, to determine to which of the returns the preference should be given, or lay out a road by a new route, which would combine the public and private interest? The sessions ultimately decide upon all the information they can obtain.

4. The fourth exception has been abandoned.

5. It is objected, that it does not appear, that notice of the view or re-review was given to the commissioners of the county, pursuant to the order of the sessions. The object of such order must have been to prevent the county being burthened with unnecessary roads of no public utility. It is a prudential precaution, though not found in the words of the law. Here three different sets of men have agreed on the necessity of a public road as prayed for. Two of the commissioners were present at the view, and one commissioner attended the re-review. If the order of the sessions had not been complied with, we may reasonably suppose, that this objection would have been made to the court below, on a road so much contested; and this not having been done, we may fairly presume, that due notice was given to the commissioners, some of whom attended.

7. The last is a general sweeping exception, referring to particular objections before made, and observed upon.

Upon the whole, on full consideration, we are of opinion that the proceedings of the sessions should be confirmed.

1810.

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FALLS' ROAD.

Proceedings confirmed.

The Commonwealth against EMERY.

Philadelphia,
Tuesday,
January 9.

IN this case *C. J. Ingersoll* for the plaintiff, moved for a rule upon the defendant to plead *instanter* to a general assignment of errors.

Scire facias ad audiendum errores not in use. The plaintiff in error proceeds by a rule on the defendant to plead.

Candy, as *amicus curia*, suggested that as the defendant had not appeared, a *scire facias ad audiendum errores* was the proper course; and if the defendant did not then come in and plead, the plaintiff would be at liberty to go on *ex parte*.

Ingersoll answered that the rule to plead took the place of a *scire facias*, which was not known in our practice.

PER CURIAM. The *scire facias* is not in use. Take your rule to plead to-morrow morning at 10 o'clock, and serve it upon the defendant.

The Commonwealth against The Cheltenham and Willow-Grove Turnpike Company.

Philadelphia,
Thursday,
January 11.

THE fourteenth section of the act to incorporate the Cheltenham and Willow-Grove Turnpike Company, enacts "that if the said company shall neglect to keep the said road in good and perfect order for the space of five days, and information thereof shall be given to any justice of the peace in the neighbourhood within the county where it should distinctly appear in the inquisition that the road has been out of repair five days, and that the part of the road complained of be stated to be in the county in which the justice has jurisdiction.

A *certiorari* by the defendant to remove the proceedings in such a case to this court, does not require a special *allocatur*.

1810.

COMMON-
WEALTH

v.

WILLOW-
GROVE
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" *the repair ought to be made*, such justice shall issue a precept to be directed to any constable, *commanding him to summon three disinterested persons* to meet at a certain time, in the said precept to be mentioned, *at the place in the said road which shall be complained of*, of which meeting notice shall be given *to the keeper of the gate or turnpike nearest thereto* within the said county; and the said justice shall at such time and place, on the oaths or affirmations of the said persons, inquire whether the said road or any part thereof is in such good and perfect order and repair as aforesaid, and shall cause an inquisition to be made under the hands of himself and a majority of the said persons; and if the said road shall be found by the said inquisition to be out of order and repair, *contrary to the true intent and meaning of this act*, the said justice shall certify and send one copy of the said inquisition to each of the keepers of the turnpikes or gates between which such defective place shall be, and from thenceforth the tolls hereby granted to be collected at such turnpikes or gates shall cease to be demanded paid or collected, until the said defective part or parts of the said road, shall be put in perfect order and repair as aforesaid," &c. 5 *St. Laws* 409.

A *certiorari* issued in this case to *Anthony Benezet*, a justice of the peace of *Montgomery* county, to remove a precept and inquisition under the foregoing section, by the return of which it appeared as follows: That on the second of September 1809, a certain *Joseph Thomas* gave information upon oath to *Benezett*, "that the *Cheltenham and Willow-Grove Turnpike Road*, from the top of *Shoemaker's Hill* to *Willow-Grove*, was not, and had not been for five days past, generally, in the good and perfect order contemplated by the 9th section of the act of assembly entitled &c." The justice on the same day issued a precept in the name of the commonwealth, directed to any constable of *Montgomery* county, reciting the information, and commanding him to summon "*Thomas Tyson*, lime-burner, of *Abington* township, *Israel Michenor* of *Moreland* township, and *John Fitzwater* of *Upper Dublin* township, to meet on the said road, at the intersection of the *Welsh road*, on Tuesday the fifth day of this month, at 9 o'clock in the forenoon, to make an inquisition thereon." On the 5th, "*Joseph*

"Thomas constable made return, and on his qualification said, he had given notice *to the keeper of the nearest turnpike gate;*" and on the same day the following inquisition was made. "The commonwealth of *Pennsylvania, Montgomery county ss.* An inquisition made on the fifth day of *September 1809*, before me *A. B.* one of the justices of the peace in and for the county aforesaid, upon the Cheltenham and Willow-Grove Turnpike Road, beginning at the top of *Shoemaker's Hill*, and extending to *Willow-Grove*, upon the solemn affirmations of *T. T.* lime-burner of &c., *J. M.* of &c., and *J. F.* of &c., summoned to inquire whether the said road, or any part thereof, is in such good and perfect order and repair as the law directs; who having viewed and examined the part of said road so described, do say, that the following parts of the said road, viz. from the top of *Shoemaker's Hill* to near the road leading to *Mather's* mill, also from the flat below *John Livezey's* house to *John Clayton's* house, generally, also from *Jesse Jenkins'* dwellinghouse to the corner of *John Kennedy's* meadow, also from the foot of said *Kennedy's Hill* to the foot of *Edge Hill*, also from the top of *Edge Hill* to *John Donnehaur's* house, ARE *not in such good and perfect order and repair*, as is directed by the ninth section of the Cheltenham and Willow-Grove Turnpike law. In witness whereof as well the aforesaid justice as the jurors aforesaid have hereunto &c." Of this inquisition, a copy was certified by the magistrate to have been sent to each of the gate-keepers between which the defective places were."

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Milnor and *Hopkinson* for the turnpike company, moved to quash these proceedings upon the following exceptions. *Condy* in support of the inquisition.

1st Exception. The justice in his precept nominates the persons who are to view the road; whereas by the act of assembly, his duty is merely to command the constable to summon three disinterested persons, leaving the nomination of them to the constable.

Answer. The act does not say who shall select the men. But it is to be presumed, that the legislature intended it should be done by the justice, as an officer of greater respectability than the constable.

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2d Exception. It ought to appear how the nearest gate-keeper was notified, and what was the purport of the notice, and the name of the gate-keeper, as well as the number of the gate or other designation. This notice should be strictly set out, because the proceeding is highly penal, and the company is not entitled by law to any other notice. From the magistrate's return it does not appear what notice was given, or whether it was given to the gate-keeper nearest to the place complained of, or nearest the house of the justice. The law requires the former. It ought to have been in writing, and the length of notice should be set forth, that the court may judge whether it was reasonable. This proceeding is in the nature of a conviction by an inferior jurisdiction, and must be taken strictly. *The King v. Little (a)*, 1 Burr's Just. 485.

Answer. The act does not require the name of the gate-keeper to be given, because it may not be known. Nor does it require any particular length of notice, or that it should be in writing. It is sufficient that notice was given; and from the whole proceeding it follows necessarily that the notice related to the precept and inquisition, and was given to the gate-keeper nearest the place complained of.

3d Exception. *Joseph Thomas* the constable, being the informer, ought not to have been the officer executing the precept of the justice. He is called upon to name disinterested men, which it is not probable he will do, after having made himself a party; and at all events, it depends upon him whether the company shall have proper notice.

Answer. He is not entitled to select the inquest; his duty is merely ministerial. But if it were otherwise, he has no interest whatever; he neither gains nor loses by the result.

4th Exception. The viewers have not found according to the directions of the act of assembly, that the road had been out of repair for five days last past. In this alone consists the offence, and so it is stated in the information; but the inquisition does not pursue it, and the court will not aid it by intendment. The two cannot be joined together for the pur-

(a) 1 Burr. 613.

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pose of making out the charge. *The King v. Fuller* (a) is in point that convictions ought to be certain, and not taken upon collection. Upon a conviction for killing fish without the licence or consent of the owner, the want of a licence or consent must appear expressly. *Contra formam statuti* will not answer. *The King v. Mallinson* (b). In *The King v. Gorden* (c), the court say a tight hand ought to be held over these summary convictions. The only safe rule, is to keep them to the words and spirit of the statute. *The King v. Trelawney* (d), *Boscawen on Pen. Stat.* 25. 95.

Answer. The inquest is required merely to examine the state of the road, at the time of the view, and not in time past. They have no authority to call witnesses for the purpose of ascertaining the prior situation of the road; their duty is as viewers only; and it is their report taken in connexion with the oath made to the magistrate, that leads to the opening of the gates.

5th Exception. Although *Anthony Benezet*, a justice of the peace of the county of *Montgomery*, acted officially in these proceedings, it does not appear on the face of the same, as it ought to do, that the part of the road complained of is within the county of *Montgomery*. Part of the turnpike road is in *Philadelphia* county, and part in *Montgomery*; and the cases cited prove that it is indispensably necessary that the jurisdiction of the justice should appear. *The King v. Johnson* (e) is in point. *The King v. Jeffries* (f), *The Queen v. Highmore* (g), *The King v. Tucke* (h), *Avery v. Hoole* (i), *The Mayor v. Mason* (k).

Answer. The part of the road out of repair, is distinctly stated; and the court will take notice that it is in the county of *Montgomery*. The convictions referred to in the cases cited, wholly omit to state the place of the offence.

6th Exception. The viewers were not sworn or affirmed. (This exception was taken by mistake, as it does appear by the inquisition that they were affirmed.)

7th Exception. It does not appear that the justice com-

(a) 1 *Ld. Ray.* 509.(b) 2 *Burr.* 679.(c) 4 *Burr.* 2281.(d) 1 *D. & E.* 222.(e) 1 *Stra.* 261.(f) 1 *D. & E.* 241.(g) 2 *Ld. Ray.* 1220.(h) 2 *Ld. Ray.* 1387.(i) *Cowp.* 826.(k) 4 *Dall.* 266.

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plied with the injunctions of the act, in directing the viewers to meet at the place in the said road which had been complained of. The information states the complaint to be of the road between *Shoemaker's Hill* and *Willow-Grove*; and the precept is to meet at the intersection of the *Welsh* road. The law is imperative.

Answer. It is presumable that the justice ordered the viewers to meet at the very place where the road was out of repair; and in fact they did meet there. It must be taken that the intersection of the *Welsh* road is between *Shoemaker's Hill* and *Willow-Grove*.

Condy contended further, that this was not a case in which a *certiorari* could issue, at least without a special *allocatur*. The justice did not, nor was he authorized to, render judgment. The only effect of the inquisition was to impose a duty upon the company to repair the road before the next Quarter Sessions; and if they did not, then the proceedings of the inquest were to be sent to the sessions to authorize process against the persons entrusted with the road; in the same manner as against supervisors. It was therefore not in the power of this court to revise the proceedings, until they had been followed by the judgment of the sessions. But if the court could interfere, it should have been done specially. This was a criminal proceeding, and it is discretionary with the court to grant a *certiorari* in such a case. The commonwealth had a right to the writ of course; but the defendant must lay a sufficient ground by affidavit; 1 *Bac. Abr.* 559. *The King v. Eaton* (a), *The King v. Bass* (b); and as it had issued here without leave, and to the great inconvenience of the public, as it intercepted the proceeding in the sessions, he therefore moved to quash it.

It was answered that the proceeding was complete upon sending a copy of the inquisition to the gate-keepers, because from that time the right to take toll ceased; and that it was incident to all such jurisdictions to have their proceedings returned into this court by *certiorari* for examination. *Groenvelt v. Burwell* (c), *The King v. Inhabitants in Glamorganshire* (d). That by the act of 13th April 1791, 3 *St.*

(a) 2 *D. & E.* 89.
(b) 5 *D. & E.* 251.

(c) 1 *Ld. Ray.* 469.
(d) 1 *Ld. Ray.* 580.

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Laws 94, a special *allocatur* was necessary to the defendant only when the object was to remove an indictment; but that a *certiorari* to remove such proceedings as these, had always been considered as the defendant's right, at least it had never been the practice to ask it specially.

TILGHMAN C. J. delivered the court's opinion.

A motion has been made to quash the *certiorari*, in as much as it was not specially allowed by this court or any member thereof. It has been urged, that on grounds of public convenience, the *certiorari* ought not to have issued, unless it had previously received a special *allocatur*. Unquestionably this court has a superintending power over its own process, and will see that it is not abused; but we know of no instance wherein an application has been made to the court, or any judge in the vacation, for the allowance of a *certiorari* to remove proceedings before justices of the peace in civil cases. The consequences of the procedure affect materially the rights of the company; and it would be doing them manifest injustice to debar them from the examination of matters touching their immediate interests before a tribunal of limited jurisdiction. We therefore overrule the motion.

No less than seven exceptions have been taken to the proceedings. We do not deem it necessary to give an opinion on all of them, as we are clearly satisfied that two of them at least are fatal.

The inquisition taken before the justice of peace and the three persons summoned to view the road, only finds that on the 2d *September* 1809 when the same was taken, the said road, in different parts thereof, was not in good and perfect order as the law directs; but does not find that it had so continued for the space of five days. This was essentially necessary, under the 14th section of the act of 24th *March* 1803, (*5 St. Laws* 409) which incorporated the company.

Nor does it appear, either in the information made to the justice, his precept, the inquisition, or his record returned, that the parts of the road complained of, as being out of repair, were in the county of *Montgomery*. This also was necessary by the same section of the act. It must clearly ap-

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pear on the face of the proceedings, that the justice of the peace acted within his jurisdiction. The law cases adduced by the counsel of the turnpike company abundantly prove, that these two exceptions are insuperable. We are also strongly inclined to think that the gate-keeper, to whom notice of the inquisition was sent, should have been designated by name, and the number of the gate which he kept, that it might judicially appear that the injunctions of the law had been complied with; but we give no decided opinion on this exception.

We are of opinion for the former reasons, that the proceedings before the justice should be quashed.

Proceedings quashed.

Philadelphia,
Thursday,
January 11.

CARPENTIER against The Delaware Insurance Company.

The arbitration law of 29th March 1809, embraces actions in the Supreme Court; but an appeal from the award of arbitrators, lies only to the Common Pleas.

If the defendants are a body corporate, they are entitled to appeal without entering into a recognisance of bail.

CONDY for the defendants obtained a rule to shew cause why the rule of reference in this case, and the report of arbitrators thereon, should not be set aside, upon the ground that the rule had been entered without authority.

The action was instituted in the Common Pleas, and removed to this court, where the plaintiff, under the first section of the act of 29th March 1809, 9 St. Laws 125, entered a rule of reference. The defendants at the time, denied the authority of the rule, and protested against it; but under this protestation, they chose one of the three referees to whom the cause was submitted, and who awarded a large sum in favour of the plaintiff.

The question turned upon the construction of various sections of the act before referred to, which are hereafter particularly noticed in the opinion of the court.

The grounds upon which *Condy* and *Rawle* contended that the rule should be made absolute, were two.

1. That the arbitration law did not embrace cases in the Supreme Court. This they inferred from the circumstance

of this court's not being mentioned in the act,—from the *express* requisition of the law that an appeal from the award shall be entered in all cases with the prothonotary of the *proper county*, that is, in the Common Pleas, *section 11*,—from there being no provision for sending the record from this court to the Common Pleas in case of an appeal,—from the force of the expressions in the 1st section, “in all civil actions *brought* or that may be *brought* in any court of this “commonwealth,” which do not include causes brought in the Common Pleas and removed to the Supreme Court,—and from the general rule of construction, that where a statute enumerates inferior persons and courts, though at the same time it uses general terms, persons or courts of a superior grade are not included in it.

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2. That it did not embrace the case of a corporation, defendants. This they said resulted from the provisions of the 11th, 12th, and 13th sections upon the subject of appeals. In every case within the law an appeal is given; but in no case can it be obtained by the defendant, without entering into a recognisance, conditioned to pay the debt and costs, or to surrender him to jail. A corporation cannot give such a recognisance, because it cannot be surrendered. If it is given, it is an absolute recognisance to pay the money, which the law does not intend.

They said, at the same time, that although the question, to what court an appeal from the award in this cause should be made, was not directly involved, yet as the consequence of omitting to make a proper appeal in fifteen days, was that the award became final, it was of great importance to suitors, that an opinion should be expressed on that point.

Ingersoll, who shewed cause, contended, 1. That the language of the 1st section was as comprehensive as it could be made. It embraces all civil actions or suits in ANY court of this commonwealth; and it directs the rule of reference to be entered at the prothonotary's office, generally, not of the *proper county*, which, if the defendants' argument upon those words has any effect, is a complete answer to it. The law was intended to remedy the delay incident to judicial proceedings in this state; and it is well known, that from the increase of suits, and the defective organization of the judi-

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ciary, the mischief has been as severely felt in this court as in any other. The object should be to extend, rather than to narrow the remedy.

2. That a corporation, when plaintiffs, may enjoy the benefit of the law cannot be doubted. It would be extraordinary therefore, if, as defendants, they could deny it to others. But the fact is, the law contains no exception in their behalf; and although as it respects them, one part of the recognisance may be inoperative, yet the other is not, and therefore they may give it.

As to the forum of appeal, there are inconsistencies in the law which cannot be reconciled. It is fair therefore to resort to the argument *ab inconvenienti*. An appeal to the Common Pleas is a great evil, not only because it is always wrong to appeal from a superior to an inferior court, but because it is an instrument of the most vexatious delay, the very mischief the law intended to cure. Causes originate in the Common Pleas. After some time they are removed to this court. At the expiration of a year or two they are referred, and then by an appeal from the award, they are carried back to the Common Pleas, to take the standing of a new suit, and to run the same course over again. Such an appeal moreover enables a party to oust this court of its jurisdiction; he may effectually prevent the trial of the cause any where, except before arbitrators, or in the Common Pleas.

TILGHMAN C. J. delivered the court's opinion.

Three questions have been brought forward by the defendants' counsel in this case. 1st. Whether the supplement to the arbitration act, passed 29th March 1809, extends to suits depending in this court? 2d. Whether it extends to suits in which a body corporate is defendant? 3d. If the law comprehends suits in this court, to what court does the appeal from the report of the arbitrators lie? In the course of the argument, great stress has been laid on the inconveniences which will ensue, if the act is construed so as to include actions in this court. When the meaning of a law is doubtful, the argument from inconvenience has great weight; but when the meaning is clear, it is the duty of judges to construe it according to its intent, without regard to conse-

quences. This is the duty of judges in all countries; but particularly in this country, where the legislature is convened at least once in every year, so that there are frequent opportunities of removing inconveniences.

It is enacted in the 1st section of the act, that it shall be lawful for either party, in all civil actions or suits brought or to be brought, *in any court of this commonwealth*, to enter at the prothonotary's office, a rule of reference, &c. It is impossible to make use of language more clear or more comprehensive. Nor can any good reason be assigned, why the city and county of *Philadelphia* should have been distinguished from all other parts of the state, with regard to the operation of this law. However people may differ about its policy, it must have been intended by the makers as a public benefit. It would therefore have been an unpardonable partiality in them, to exclude the suitors of any court from its advantages, and particularly the suitors of a court in which the most important causes are decided. This act appears to have been drawn in great haste, and is not perfectly consistent. Obscurities and difficulties will be found in the subsequent parts; but nothing of sufficient weight, to take off the force of those general words in the 1st section which define the objects of the law. I shall take notice of several of those difficulties in considering the second and third questions.

2d. If bodies corporate, *defendants*, are not within the law, it must be because there is something in their nature inconsistent with its provisions; for they are not expressly excepted. It is contended that they must be excepted by implication, because they are excluded from the benefit of an appeal, which is given on conditions incompatible with the nature of a corporation. If the premises of this argument are well founded, the conclusion follows inevitably. It was the manifest intention of the law to give an appeal in all cases; and this no doubt from a firm resolution of the legislative body, not to violate the constitution of the commonwealth, which secures to the citizens the trial by jury. It is to be examined then, whether corporations being defendants are, excluded from an appeal? The 11th section gives an appeal under certain rules, regulations, and restrictions, one of which is that the party appellant shall enter into a recogni-

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sance, the nature of which, in case the defendant appeals, is thus described in the 13th section. "He shall enter into a recognisance with one or more sureties in the nature of special bail, the conditions of which shall be, that if the plaintiff shall obtain a judgment for a sum equal to or greater, or a judgment as or more favourable, than the report of the arbitrators, the said defendant shall pay all the costs which shall accrue before the arbitrators, or before the Court of Common Pleas, together with the sum or value of the thing awarded by the arbitrators, with one dollar a day for each day which shall be lost by the plaintiff in attending to such appeal; or in default thereof, shall surrender the defendant or defendants to the jail of the proper county, &c." It is very clear, that one of the alternatives in this condition is not applicable to a corporation, which is not a natural but a political body, incapable of being surrendered or imprisoned. The members of a corporation indeed are natural bodies, but subject to constant change. Those who are members to day, may cease to be so to-morrow. In suits against corporations, none of the members are responsible personally, nor can they be held to bail. The object of the suit is to obtain redress from the funds of the corporation, and the execution goes against those funds only. I agree therefore with the defendants' counsel, that the form of the recognisance is not applicable to a body corporate *defendant*; but from this I draw a conclusion different from theirs. The appeal is to be construed liberally, because it is in support of the constitution. I do not infer that the defendants can have no appeal, but that they may have an appeal without entering into any recognisance. This construction is more consistent with the general intent of the law, than to say that a corporation, when plaintiff, may compel their adversary to an arbitration, but when defendant, may submit to an arbitration or not at their pleasure. It could not have been the intent of the law that they should enter into an obligation, to be void on doing a thing which was impossible to be performed. It is fair therefore to conclude that they shall be exempt from such obligation. I proceed to the third question. To what court is the appeal to be made?

The 11th section declares that if either party shall be dis-

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satisfied with the report of the arbitrators, he shall have an appeal to the *Court of Common Pleas of the proper county*; nor is there any part of the act which gives an appeal to any other court. The 12th and 13th sections, which direct the form of recognisance in case of an appeal by plaintiff or defendant, are in conformity to the 11th section; they speak of costs in the *Common Pleas* in consequence of the appeal, but not a word of costs in any other court. Where then shall we find authority for giving an appeal to any other court? It is not to be seen in the law. Why this is so, I know not; and it is certain that the appeal to the Common Pleas in case of actions which were depending in the Supreme Court, will be attended with inconveniences. The 10th section directs the arbitrators to return their report to the prothonotary, that is, as I understand it, to the prothonotary of the court in which the rule of arbitration was entered. The prothonotary is to enter the report in his docquet, which from the time of such entry, to use the expression of the law, is to rank as a judgment. The 11th section directs the party appellant to enter his appeal with the prothonotary of *the proper county*, with the recognisance of bail, within fifteen days from the entry of the report of the arbitrators *in his docquet*, otherwise the prothonotary may issue execution. Here is an inconsistency; for in actions depending in the Supreme Court, the report is to be entered in the docquet of the prothonotary of the Supreme Court, and not in the docquet of the prothonotary of the county. To give efficacy therefore to this part of the law, the appeal must be entered within fifteen days from the time the report is entered on the docquet of the Supreme Court. It has been remarked too, that there is no provision for sending down the record from this court to the Common Pleas. This however may be got over; for if the cause is to go there, we have power to send the record, without an express provision. Other difficulties have been suggested, which it is needless to enumerate. It is to be hoped they will be removed by the legislature. At present we are called upon to decide to what court the appeal lies. Finding it given to the Court of Common Pleas, and not to any other court, I am of opinion that it can be made to that court only.

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It follows that the rule to shew cause why the report of the arbitrators should not be set aside, must be discharged.

Rule discharged.*

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Thursday,
January 11th.

✓ The Commonwealth against COCHRAN.

The act of 19th February 1801, which authorizes the receiver general to give certificates of credit to certain persons, whose lands fell within the state of New York, to be used in taking out new warrants, operates, so far as respects those warrants, as a repeal of all former laws requiring a settlement previous to the issuing of a warrant.

IN this case, *Hemphill* moved for a rule upon the defendant, the secretary of the land-office, to shew cause why a *mandamus* should not be awarded, commanding him to prepare and deliver patents to *Jonathan Smith*, for various tracts of land for which warrants had been issued in favour of *Peter Wikoff* and *Jonathan Bayard Smith*, under a law passed the 19th February 1801; and which warrants had been regularly transferred to the said *Jonathan Smith*.

The motion was founded upon the following facts, part of which were exhibited in a statement prepared by the counsel on both sides, and part appeared by official documents.

Jonathan Bayard Smith, *Peter Wikoff* and others, took up lands under warrants from the commonwealth of Pennsylvania in the year 1785. Upon ascertaining the north boundary line of the state, it was found that they fell within the state of *New York*; and upon the representation of this circumstance to the legislature, they passed a law on the 19th February 1801, in the following terms: "That the board of property, upon application for that purpose by *Jonathan Bayard Smith*, and *Peter Wikoff*, and others also, whose lands fell within the state of *New York* on running the north boundary line between this state and the said state of *New York*, shall ascertain the amount of the payment made by them for the lands as aforesaid, and shall certify the same to the receiver-general, who shall there-

* The provisions of the law upon which this case was ruled, have in many respects been altered by "an act to regulate arbitrations," passed the 19th March 1810. By the 11th section of this act, the appeal lies to the court in which the cause was pending at the time the rule of reference was entered.

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“ upon deliver a certificate or certificates of such sum, with
 “ interest thereon from the time of the payment, to the said
 “ *Jonathan Bayard Smith and Peter Wikoff*, and others as
 “ aforesaid, and enter a credit in his book for the same,
 “ which may be transferred to any person, and passed as
 “ credit, either in TAKING OUT NEW WARRANTS IN ANY
 “ PART OF THE STATE WHERE LAND MAY BE FOUND, or in
 “ payment of arrears of former grants.” 4 St. Laws 673.
 Upon the first application by *Smith and Wikoff* to the board of
 property to carry this law into effect, instead of making up the
 account and certifying to the receiver-general, the board di-
 rected the deputy surveyor to ascertain what parts of the tracts
 were situated in *New York and Pennsylvania* respectively, and
 to make return; but in *August 1804*, without taking notice of
 any such return, they directed the account to be stated by the
 receiver-general, by which a balance of 441l. 4s. appeared to
 be due to *Wikoff*, and 973l. 13s. to *Smith*; and for these sums
 credits were entered on his books, and certificates issued,
 with which new warrants were taken out on the 6th of *Sep-*
tember 1804, and executed upon lands in *M^cKean county &c.*
 within the new purchase. The surveys were returned into
 the land-office, and accepted; but at the time the warrants
 were executed, and up to the present time, no settlement
 had been made nor grain raised, nor did any person reside,
 on the lands on which they were laid; and therefore the
 officers of the land-office refused to grant patents. It was
 admitted that *David Meade* and others, under a similar law
 passed the 9th of *March 1796*, had obtained warrants and
 patents for lands in precisely the same circumstances as those
 of *Smith and Wikoff*; and by consent the affidavit of *J. B.*
Smith was read, stating that all the land, but about twenty
 acres of one tract and fifty of another, had been found to be
 within the state of *New York*, and that he had released all his
 right &c. in the lands to the state of *Pennsylvania*.

Franklin (attorney general) said that he appeared at the
 instance of the board of property, who desired the opinion
 of the court, and would acquiesce in it; and although at some
 future time he might contend, that a case of this kind was
 not proper for a *mandamus*, yet from a desire of the board to

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possess a judicial opinion upon the question, he did not at present oppose the rule upon that ground. One objection to the patents, is, that *Smith* and *Wickoff* were entitled to credit for only that part of the land which fell within the state of *New York*; and therefore the return of the deputy surveyor under the first order of the board, was a preliminary to any credit at all. But the main objection is, that by the act of 22d April 1794, 3 St. Laws 581, the land-office was prohibited from issuing warrants for lands within the *new purchase*, "except in favour of persons claiming the same by "virtue of some settlement and improvement being made "thereon;" and by a supplement to that act, passed the 22d September 1794, 3 St. Laws 636, the office was prohibited from receiving applications for any lands within the commonwealth, except for such lands whereon a settlement had been, or should be thereafter made, grain raised, and a person or persons residing. As the warrants in this case were laid upon unsettled lands, they come precisely within the interdiction of those laws, and therefore they are not entitled to confirmation by patent. The law of 1801 was passed while the interdiction was in full force; and unless it operated as a repeal in a certain degree of the laws of 1794, there is no ground for the motion. It did not operate as a repeal for various reasons. It contains no terms which relieve the warrants issued under its authority, from restrictions imposed by other laws; and as it was passed at the solicitation of parties who must have known of these restrictions, an exemption from them if desired, would have been asked. If it operated as a repeal of any, it did of all restrictive laws; and then it would have been in the power of the parties to lay their warrants on land west of the *Alleghany* river, free from any condition of settlement, which would be in direct violation of the act of 3d April 1792, 3 St. Laws 209. It would also, if treated as a repeal, give the parties a bounty greatly beyond their merit, instead of an indemnity which alone was intended. Between the date of their first warrants, and those in question, the purchase money of lands had been reduced from 30l. to 5l. the hundred acres; and this was itself a sufficient advantage, without coupling with it an exemption from all the conditions upon which other citizens must purchase. From these circumstances it must result,

that the legislature intended only, that the holders of these credits, if they preferred taking warrants instead of paying arrears on former grants, should take them precisely on the same terms on which they were granted to other citizens, conformably to the existing laws of the commonwealth. The act is a private act in relation to a particular privilege, and is therefore to be interpreted literally. *Threadneedle v. Lyman (a)*. The proceedings in the case of *David Meade* are of no authority; they are held by the present board of property to have been in violation of law.

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Hemphill and *Ingersoll* for the rule, argued in answer to the first objection, that the board of property had no authority to direct a survey, the legislature having settled the fact that the lands fell within *New York*, and having assigned to the board nothing but the ministerial duty of calculating the amount of the payment for them. But if any thing was wanting to shew the state of the land, it was to be found in the affidavit of *Mr. Smith*. In answer to the principal objection, they contended that the practice under the law for the relief of *David Meade* and others, was of great weight, because it was known to the legislature when they passed a similar law in 1801; and if a change had been intended in the practice, there would have been a change in the law. On the language of the law, however, standing by itself, there can be no doubt. It contains no reference to prior laws, but is a direct authority to the individuals named, to take out warrants *immediately* for lands in any part of the state; and is therefore a repeal of all laws which prohibited warrants from being taken out, except after settlement and improvement made. It opens the land-office as to these parties, in the same manner as if the laws of 1794 had not passed. They are certainly to comply with all conditions imposed upon purchasers in the district where the warrants are executed; that is, if the warrants had been laid west of the *Alleghany*, they must have been followed by settlement; but purchasers to the eastward of that river are under no such obligation. The construction given by the board of property defeats the design of the law. The law authorizes

(a) 2 Mod. 57.

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warrants, which we agree to take upon the conditions on which warrants are always issued. The board say we must perform conditions before we get them. The law gives us interest to the date of the credit, but no longer, because we may use the credit at once to take out warrants. The board would compel us to sacrifice the use of the credit, for as many years as would be necessary to make a settlement and improvement, or to transfer it at a reduced price to persons who had already made them. The legislature have in fact confirmed our construction by an act passed the 1st *April* 1805, 7 *St. Laws* 210, which directs the payment of certificates under the act of 1801, out of the public treasury, and then *for the future* prescribes the condition of settlement and cultivation, which it did not while the certificates were not equal to cash. This law is a clear authority for the former practice of the board of property.

TILGHMAN C. J. after stating the case, delivered the court's opinion as follows.

The objection to the patents is founded on the act "to prevent the receiving any more applications, or issuing any more warrants, except in certain cases, for land within the commonwealth," passed 22d *April* 1794, and a supplement thereto, passed 22d *September* 1794. These acts forbade the issuing of warrants or receiving applications for lands on which no settlement and improvement had been made; and it is contended, that as the warrants in question were laid on unsettled lands, their execution was illegal, and ought not to be confirmed by patents. It appears to us that this objection is not well founded. Upon a fair construction of the act of 19th *February* 1801, the persons in whose favour that law was made, had a right to take out warrants for their own use for vacant lands in any part of the state; and they were to pay the price, and comply with all the conditions imposed on the purchasers of land in that part of the state, where the lands lay. If they lay west of the *Alleghany* river, they would have to comply with the terms of settlement and improvement required by law to complete a title in that quarter; but if east of that river, nothing but the usual price in money was required. To give the act of 19th *February* 1801, any other construction, would be to deprive the persons intend-

ed to be compensated, of a very material benefit, I mean the benefit of taking out warrants for themselves. They would have been obliged to sell their warrants to settlers, which would have very much reduced their value, or to speak more properly, they might have transferred to settlers their credit on the books of the receiver-general; but would have had no right to take out warrants themselves, unless they either purchased the right of settlers, or seated themselves on the lands intended to be taken up. This never could have been the intent of an act, by which it was designed to make a liberal compensation to persons who had paid money to the state through a mistake of its own officers. The compensation was liberal, because it included interest to the time of issuing the certificates. No interest was allowed on those certificates, because it was supposed that the holders might immediately use them as cash, by taking out new warrants. The opinion of this court is that the act of 19th *February* 1801, operated as a repeal of all former acts, requiring a settlement *previous* to the issuing of a warrant, so far as concerned warrants to be issued in favour of those persons who obtained credit in the books of the receiver-general in the manner above mentioned. They therefore allow the motion.

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Rule granted.

The Commonwealth *against* JOHNSON and FELTON.

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RAWLE obtained a rule upon the defendants, who were supervisors of the roads in the township of the northern liberties, to shew cause why a *mandamus* should not issue, commanding them to pay two orders drawn upon them by *Frederick Wolbert* and others justices of the peace, in favour of *Robert Brooke* and *Jacob Kessler*.

A *mandamus* lies to the supervisors of the roads, to compel them to pay an order drawn upon them by justices of the peace under the direction of an act of assembly.

Upon the return of the rule, a variety of facts were laid before the court, which it is not material to detail, as they did not bear upon the particular question hereafter noticed, namely, the authority of the court to issue a *mandamus* in

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the present case. So far as they related to this point, the facts were these:

By an act of the general assembly passed the 17th *April* 1795, 3 *St. Laws* 1722, the governor was authorized to appoint three surveyors, to survey and regulate the streets &c. in the *Northern Liberties*, within specified boundaries; and the third section of the law enacted, in the following terms, "that the justices of the peace in the township of the *Northern Liberties*, shall be authorized to draw orders on the supervisor or supervisors of the roads for the said township, for the pay and incidental expenses of the said surveyors, who are hereby *enjoined* and *required* to pay the amount of such orders, and the same shall be allowed to the said supervisors in the settlement of their accounts." *Brooke* and *Kessler* were two of the surveyors appointed by the governor; and on the 6th of *May* 1809, an order for six hundred and thirty-four dollars and fifty-two cents was drawn on the supervisors by twelve justices, in favour of Mr. *Brooke*, for services rendered by him under the said act, and in favour of Mr. *Kessler* on the same account for one hundred and six dollars thirty-seven cents. These orders were presented to the defendants, who refused payment.

A number of objections were made to the legality of the orders, upon the ground of a supposed irregularity on the part of the surveyors and justices in carrying the law into effect, and also because the entire number of justices in the township, thirteen, had not signed them. But supposing the orders to be legal, still,

Browne and *S. Levy*, who shewed cause, contended that a *mandamus* did not lie. The great object of the writ of *mandamus*, they said, was to give a specific remedy, where none other existed; as to compel the admission of a party to an office or franchise of a public nature, to academical degrees, to the use of a pulpit, and the like; 3 *Bl. Comm.* 110; cases, in which no other form of action, and no indictment, could give the suitor the enjoyment of his right. But where he has another specific legal remedy, unless it be either extremely tedious, or, like the writ of *assize*, obsolete, the rule adopted in lord *Mansfield's* time, and uniformly followed since, has been to leave the party to that remedy, and to

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deny the *mandamus*. The case of *The King v. The Bishop of Chester* (a) is full to this point. A *mandamus* to a bishop to licence a curate was refused, because the curate had another specific legal remedy by *quare impedit*. Taking this to be the rule, a *mandamus* should not issue to compel the payment of an order, or to permit the transfer of stock, because in each case, if the party has a right, he has a specific legal remedy, either by *indebitatus assumpsit*, or by an action on the case. It is believed that no case can be shewn in *England*, in which a *mandamus* has issued under these circumstances; and there are two direct authorities against it. The first is the case of *The King v. The Bank of England* (b), where the application was for a *mandamus* to the defendants, to permit the prosecutor to transfer 1000*l.* bank stock, and it was refused, because an action would lie for complete satisfaction equivalent to a specific relief. The other is *The King v. Bristow* (c), which is in point to the present case in every particular; for there the King's Bench refused a *mandamus* to a county treasurer, to obey an order of the quarter sessions for the payment of money, and referred the prosecutor to his remedy by indictment. Lord *Kenyon* in delivering judgment, said that the best way of preserving this beneficial writ, was to be sparing in the use of it; and that although the court would grant a *mandamus* to the justices to draw an order, yet they would not to the treasurer to pay it. The former falls within the true reason and purpose of the writ; the latter does not. In the case before the court, the surveyors may have an action against the supervisors for the nonpayment of the money, which is as specific a remedy as the *mandamus* itself, or they may proceed by indictment for their neglect of duty, as in *The King v. Bristow*.

Sergeant and Rawle for the *mandamus*, argued upon this point, that the reason, which had uniformly been assigned for the *mandamus*, and which had been stated by the defendants' counsel, was the very inducement to their application for it. The prosecutors have no other specific legal remedy; in fact they have no other certain remedy whatever. It is to be recollected that the surveyors did not contract with the

(a) 1 D. & E. 396.

(b) *Doug.* 506.

(c) 6 D. & E. 168.

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defendants, nor upon the credit of their personal responsibility; but that the contract was with the township, and their security was in the road tax fund, which the law expressly orders to be applied in satisfaction of their claim. An action against the supervisors must be either in their personal or official capacity. If in the former, it cannot appear that they will be able to discharge the judgment; if in the latter, they may go out of office before the suit is determined; and in no event can an execution go against the treasury. They cannot be indicted, because, inasmuch as the order may be enforced in another manner, the indictment is taken away by the act of 21 March 1806, section 13. 7 *St. Laws* 569; and if it were not, the prosecution would result only in a fine to the commonwealth. There is therefore no process but this, by which the surveyors can obtain payment of the order, or even what is equivalent to it; and that is a sufficient ground for the *mandamus*. In *The King v. Barker* (a) lord Mansfield said it ought to be used on all occasions where the law has established no specific remedy, and where, in justice and good government there ought to be one. It certainly has been often used by this court, in cases like this; as to compel county treasurers to pay warrants drawn by the commissioners. *The King v. The Bank of England* presents a very different case; for in an action against the bank, the plaintiff would have recovered satisfaction out of the very fund he wished to transfer. The only case that bears against us, is *The King v. Bristow*, which, although entitled to respect, is not binding as an authority. But in the first place, that was not a case in which the payment of the order was enjoined by statute. In the next place, the court refused the *mandamus* upon the ground that it would be descending too low to issue it to an officer so subordinate as a county treasurer; a consideration which has not governed this court heretofore, and which deserves very little attention. And lastly, it has been overruled, or at least it has been disregarded in a later case, in which the King's Bench expressly assert their authority to enforce by *mandamus* the payment of an award by commissioners, under an inclosure act. 2 *Tidd* 763.

(a) 3 *Burr.* 1267.

The opinion of the court, which was delivered upon the whole case, was on this point as follows:

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TILGHMAN C. J. The point which required most consideration, was, whether the case was of such a nature as called for a *mandamus*; and we think that it is, because the supervisors are public officers, directed by the act of assembly to pay such orders as are legally drawn by the justices, and because the surveyors have no other specific remedy. It is said that the supervisors may be indicted for neglect of duty. But if they were indicted and convicted, the orders might still be unpaid. It is said also that if they withhold payment without just cause, they are liable to an action. Granting that they are, it must be brought against them in their private capacity; and there is no form of action against them, which, being carried to judgment, will authorize an execution to be levied on the treasury of the *Northern Liberties*. Now it was to this treasury that the surveyors had a right to look, when they acted under their commission from the governor. It may be said, that in truth their contract was with the township, and from the township they have a right to expect payment.

The court ordered the rule to be made absolute for a *mandamus* in the case of each surveyor.

Rule absolute.

CRESOE *against* LAIDLEY.

Philadelphia,
Thursday,
January 11.

THIS was an ejectment for a house and lot in the city of Philadelphia, under the following circumstances, which were stated in a case for the opinion of the court:

Samuel Eldridge of the city of Philadelphia died intestate on the 13th of October 1804, seised of the premises in the

and several cousins, the children of deceased paternal great uncles and aunts. This is a *casus omissus* in the intestate laws, and the estate descends to the heir at common law.

The heir at common law takes in all cases, except in those which are specifically enumerated in the acts of assembly.

A. dies intestate, seised of real estate which descended from his father, and leaving a mother and brother of the half-blood, a paternal aunt,

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declaration mentioned. At the time of his death, his wife was enscint of a son who was born on the — day of —, 1804, and named *Samuel*, to whom the premises descended, and who became seised thereof. The widow of the intestate afterwards intermarried with *John Harland junior*, by whom she had issue a son now living, shortly after whose birth, *Samuel Eldridge* the younger died seised of the premises, an infant, unmarried, and without issue, leaving the following relations, on the maternal side, viz. a *brother of the half blood*, a *mother*, a maternal grandfather and grandmother. On the paternal side he left,

1. *Jane Smith* the only child of *Elihu Eldridge*, who was the oldest son of *Daniel Eldridge*, the oldest son of the intestate's great grandfather; and *Daniel Eldridge* the second son of the said *Daniel*.

2. *Thomas Eldridge*, *William Eldridge*, and *Mary Bishop*, the children of *Thomas Eldridge* the second son of the said great grandfather.

3. *Martha Garetson*, the daughter of *Esther*, who was a daughter of the said great grandfather.

4. *Zilpah Hand* and *Jehu Eldridge*, the children of *Eli Eldridge*, who was the fourth son of the said great grandfather.

5. *Hannah Cresoe*, (the plaintiff) a daughter of the said great grandfather, and the intestate's paternal great aunt.

The question for the opinion of the court was, whether the premises descended to the heir at common law, or were to be distributed under the intestate laws of *Pennsylvania*; and if the latter, to how much if any the plaintiff was entitled,

Binney and *Hopkinson* for the plaintiff. The case in a short compass is this. The intestate died seised of real estate which descended to him from his father, leaving on the maternal side a *brother of the half blood*, a *mother*, grandfather and grandmother, and on the paternal side, a great aunt, and the children of paternal great uncles and great aunts. The question, is how is the estate to go? We contend that it is to be distributed according to the act of assembly of the 19th April 1794, 3 St. Laws 521, and that the plaintiff takes one fifth. The 12th section of that act directs that "the real and personal estate of any person dying

"intestate, in case such person leaves neither widow nor
 "lineal descendant, nor father *or mother*, or brothers or
 "sisters of the whole or *half blood*, shall descend to and be
 "divided among the next of kin of equal degree." Within
 the spirit of this and other sections of the act, he did not
 leave either a mother, or brother of the half blood. 1. As
 to the mother. She is to be considered with relation to his
 paternal estate, as having died before him. The 7th section
 provides, that in case any person shall die seised, leaving no
 widow nor lawful issue, nor father, but leaving a *mother*, the
 whole of the real estate shall be enjoyed by the mother dur-
 ing her life, *unless it came to the intestate on the part of his*
father, in which case such estate shall descend, pass, and be
 enjoyed, as if such person so dying seised, *had survived his*
mother. It is a principle which runs throughout the act, that
 where, in case the intestate does not leave a *particular rela-*
tion, the estate is given to another person, the law always
 means a particular relation *capable of taking*; and if he is not,
 it is the same as though he did not exist. And the reason of
 it is this, that in no instance does the law give the estate to
 another person, in case the intestate does not leave a particu-
 lar relation, without having previously provided that the
 particular relation shall take if he is capable of taking. For
 instance, by the 5th section, if the intestate dies leaving
 neither widow nor lawful issue, but a father, the father takes
 the real estate for his life, unless it came on the part of the
 mother; in which case it goes as if the intestate had survived
 his father. The 6th section directs, that in case he shall
 leave neither widow nor lawful issue, but a *father* and
 brothers and sisters, the estate shall descend to and be en-
 joyed by the brothers and sisters as tenants in common, *after*
the decease of the father. Here the law evidently means a
 father *capable of taking*, because by the prior section, it
 would go to the brothers and sisters at once, if the father
 was not capable. Then comes the 7th section before referred
 to, containing the provision as to the mother; and the 8th
 section, analogous to the 6th, directs, that in case the intes-
 tate leaves neither widow nor lawful issue, but a mother and
 brothers and sisters, the estate shall descend to and be en-
 joyed by the brothers and sisters, as tenants in common,
after the decease of the mother. Here also the law means a

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mother *capable of taking*, because if she was not; it would go at once by the 7th section to the brothers and sisters. In this manner the act proceeds, making provision in each section for a new relation; in case the intestate leaves none of the relations mentioned in the former sections, until it comes to the 12th, where the mother spoken of, must upon the same principle be intended a mother capable of taking; and therefore the intestate's mother, who cannot take, cannot interrupt the descent to the next of kin. By any other rule of construction, the paternal estate of an intestate, who leaves a mother and brothers and sisters, instead of going to the latter, will descend to the heir at common law. 2. As to the brother of the half blood. The same rule of construction governs his case. The 11th section gives the real estate of an intestate who leaves no children or lawful issue, father or mother, brothers or sisters or their issue of the whole blood, to brothers and sisters of the half blood and their issue, in preference to the more remote kindred of the whole blood, unless the estate came to the intestate by descent, devise, or gift of one of his ancestors; in which case, all who are not of the blood of such ancestor are excluded; and therefore when the 12th section gives the estate to the next of kin, in case he leaves no brothers or sisters of the half blood, it means of the blood of the ancestor from whom the estate came, which the half brother of *Samuel Eldridge* is not. It follows from the whole, that *Samuel Eldridge* left none of the relations mentioned and intended in the 12th section, and that the plaintiff is entitled to one fifth as his next of kin.

Rawle and *Lewis* for the heir at law. It is a principle, not only of the utmost importance to give certainty to the law of descents, but sanctioned by the highest judicial authority in this state, that the common law still regulates descents in *Pennsylvania*, in every case which is not expressly provided for by act of assembly. The decision in *Johnson v. Haines's Lessee* (a), under the law of 1794, fixes the rule, that wherever an encroachment on the common law takes away a right, which would otherwise be vested in the heir at law, the operation of the statute should not be extended further, than

(a) 4 *Dall.* 64.

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it is carried by the *very words* of the legislature. The particular case was an illustration of the strictness with which that rule is applied. The intestate did not leave a father or brothers and sisters, but the issue of brothers and sisters who were dead; and they claimed under the 6th section, which provides for the case of a person dying seised, and leaving a father and brothers and sisters. It was said there, as well as in this case, that the spirit of the law would divide the estate among the issue; but it was answered, that if they took at all, they must take by the letter, and that not being in their favour, the whole must go to the common law heir. That answer is justified by a train of *English* authorities, which it is not necessary to notice. The result of them is stated in *Piggot v. Penrice* (a), to be "a most known and established rule of law, that an heir is never to be disinherited but by express words or necessary implication." Under which section then can the plaintiff take? It is not supposed that any one provides for the case but the 12th; and yet here are a mother and a brother of the half blood living, who, to give the next of kin a right, by the express terms of that section should have died in the lifetime of the intestate. The construction by which this difficulty is gotten over, cannot be allowed for several reasons. First because it disinherits the heir by what is supposed to be the spirit, and not by the words, of the law. Secondly, because where the legislature intended that the life of a person incapable of taking should not interrupt the distribution, they have expressly said so, as in the 5th and 7th sections; and they have omitted it in the 12th. Again, because the 5th, 6th, 7th, and 8th sections, which are borrowed to aid the 12th, do not relate to the same kind of estate. The former regulate the distribution of estates which came to the intestate from the part of his father or mother, and which are therefore to go to the heirs of the father or mother respectively. The latter relates to an estate purchased by the intestate, and therefore the half-blood are admitted to come in. This shews moreover that the 12th section cannot affect the paternal estate of *Elbridge*. But the decisive objection to the construction is, that the legislature by a supplementary law of the 4th April 1797,

(a) *Gill. Rep. in Eq.* 138.

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4 *St. Laws* 155, supplied all the omissions in the law of 1794, which it was thought proper to supply, and made no provision for the case of the plaintiff. This law shews that the legislature thought the first act was confined to enumerated cases, and that no latitude was to be allowed in the construction of it. They have now made provision for some other cases, particularly for that of *Johnson v. Haines*; and therefore, even if it was in the power of this court, before the last law, to make a construction of the original act according to equity, yet now it cannot be done, because the legislature have stated all the additional cases to which the principle of distribution shall be applied. *Dalbury and Foster (a)*, *The Queen v. The Inhabitants of Buckingham (b)*.

Reply. *Johnson v. Haines* does not apply, because no construction however liberal, could have made the case of a father who died before the intestate, the same as the case of a father who survived him. But we have the authority of the law for saying, that in certain cases a mother who survives, is to be considered as dead, particularly within the 12th section. The rule contended for by the heir at law, is not only productive of the greatest hardship, by making persons who cannot take the estate themselves, prevent others from taking it, but it is so strict as almost to defeat the law; for if we are to adhere to the words, brothers and sisters would not be satisfied by one brother, nor even by a brother and sister. But the same strictness is not to be used in construing a statute as a will, particularly this statute, whose object it was to break up the common law rule of inheritance, and which expresses in every line an aversion to the common law heir. If the act of 1797 had been *explanatory*, the cases from *Carthew* and *Salkeld* would have applied; but it is merely an additional statute, which does not in any way infringe the right of the court to construe the terms of the original act, according to the spirit of the sections taken as one system.

TILGHMAN C. J. delivered the court's opinion.

The court are to give their opinion on a case stated, the material parts of which may be comprised in a small compass.

(a) *Carth.* 396.

(b) 2 *Salk.* 534.

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Samuel Eldridge died intestate, seised of lands in fee-simple, which had come to him by descent from his father. He left, living at the time of his death, a mother, a brother of the half blood on the part of his mother, a maternal grandfather and grandmother, a paternal great aunt (the plaintiff), and several cousins, children of paternal great uncles and great aunts. The plaintiff claims one fifth part of *Samuel Eldridge's* lands, as one of his next of kin. The defendant holds under the heir at common law. The question is, whether this case is included in either of the acts directing the descent of real estates of persons dying intestate.

On the part of the plaintiff it has been contended, that this case is included, not within the words, but the spirit and intent of the 12th section of the act of the 19th April 1794. That section is in these words: "The real and personal estate of any person dying intestate, in case such person leave neither widow nor lineal descendant, nor father, or mother, or brother or sister of the whole or half blood, or lawful issue of any brother or sister of the whole or half blood, shall descend to and be divided among the next of kin of equal degree," &c. The case before the court differs from this section of the law in two respects. The intestate left a mother and a brother of the half blood. The plaintiff's counsel get over this, by endeavouring to prove from other parts of the law, that neither the mother nor brother of the half blood on the part of the mother, can take any thing in this case, where the estate descended to the intestate from his father. This being the case, they think it unreasonable that their existence should prevent the next of kin from taking. They construe the words "mother or brother of the half blood," by adding to them the words "capable of taking any thing under this act." We think that the principles on which the law must be construed, were fixed by the case of *Johnson v. Haines*, 4 Dall. 64, decided by the unanimous opinion of the High Court of Errors and Appeals. The rule there laid down by Chief Justice *M^r Kean*, who delivered the opinion of the court, was that the heir at common law should take, except in the specific cases enumerated in the act. The case there decided was full as hard as the present. There could not be a doubt but the legislature would have included it in the act of 19th April 1794, if it

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had occurred to them. But the decision was founded on wise principles. It tended to produce certainty, which is of the utmost consequence in the law of descents. We may easily know the law, when it is established that the heir at law takes in every case not specified in the acts of assembly; but there will be no end to difficulties, if we attempt to supply the omissions of the acts, by inserting what we may suppose to have been intended by the legislature. There is another powerful reason for the strict construction of the act of 19th April 1794. It was discovered to be defective in many respects, to remedy which, the act of 4th April 1797 was passed. That act included the case which had occurred in *Johnson v. Haines*, and many other omitted cases; but it made no alteration in the 12th section of the first act, on which the present question turns. Now the latter act being made for the express purpose of supplying the defects of the first, it must be supposed that the first act was examined with great attention, and every alteration introduced, which was thought necessary. I make no doubt but many cases are still unprovided for, because they were unseen. As they occur from time to time, they may be included in new laws, if it shall be judged expedient. In the mean time the heir at common law will take in all such cases. Upon the whole, we are clearly of opinion, that the plaintiff is not entitled to recover, because she has not brought her case within either of the acts of assembly.

Judgment for the defendant.

GORDON *against* KENNEDY.

IN ERROR.

1810.

Philadelphia,
Thursday,
January 11.

THIS was a writ of error to the Common Pleas of Philadelphia county, upon which the general errors were assigned.

The action was brought to *March* term 1806, against Gordon the plaintiff in error, and at the trial a verdict was found for Kennedy, and the damages assessed generally at twelve hundred dollars.

The declaration contained seven counts. The last five were upon an *indebitatus assumpsit* for work and labour, a *quantum valebant* for the same, money laid out and expended, money lent and advanced, and money had and received.

The first count recited, that whereas on or about the eighth day of July one thousand eight hundred and five, it was agreed by and between the said Elisha Gordon and the said John G. Kennedy in manner and form following that is to say, that the said John should exercise his skill as a brewer at the brewhouse of the said Elisha, and teach the said Elisha's son the art and mystery of brewing, in consideration whereof the said Elisha did then and there undertake to pay the said John the sum of eight hundred dollars per annum in equal quarterly payments, and provide for the said John a lodging room, with bed, bedding, and fuel at the cost and expense of the said Elisha, and the said John and Elisha did then and there undertake, each to the other of them, that proper articles of agreement should be drawn and executed; in consideration of which premises, and confiding in &c., the said John, on or about the day and year aforesaid, at &c., entered the brewhouse as the said Elisha's brewer, and continued for a considerable time, to wit for the space of several months, to superintend the said brewery, and hath always from the time of making the said agreement, hitherto well and truly performed and fulfilled the same in all things on his part &c., and still continues willing to perform and fulfil &c., yet the said Elisha, not regarding the said agreement, nor his said promise &c., from time to

The plaintiff declared upon a promise on the 8th July 1805, to pay him eight hundred dollars per annum, and to find him a lodging room, bed, and fuel; and laid breaches of the contract in every part, upon which the jury assessed general damages. Judgment was reversed, because it appeared by the record, that the action was brought before the eight hundred dollars were due.

Where the plaintiff declares upon a contract consisting of several parts, and assigns among other breaches, one which from his own shewing could not have taken place before the action was brought, the court cannot intend that the damages, if assessed generally, were given only for that matter in the count which was actionable, and therefore will reverse the judgment.

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time did refuse, and still refuses to execute certain articles specifying the said agreement, although drawn up &c., and contriving &c. to deceive and defraud the said *John* in this behalf, hath not paid to the said *John* the sum of eight hundred dollars, nor any part thereof, nor hath he accommodated the said *John* with a room, nor provided for him the bed &c. aforesaid, although often requested so to do, but the same to do the said *Elisha* hitherto hath wholly refused, and still doth refuse.

The *second* count was as follows: And whereas heretofore, to wit, *the day and year aforesaid* at the county aforesaid, in consideration that the said *John*, at the special instance and request of the said *Elisha*, had undertaken and did then and there superintend the said *Elisha's* brewery, and did then and there instruct and teach the said *Elisha's* son in the art and mystery of brewing, he the said *Elisha* undertook, and then and there faithfully promised the said *John*, to pay him the sum of eight hundred dollars PER ANNUM, and to provide for the said *John* a convenient lodging room with bed bedding and fuel at the cost and expense of the said *Elisha*; and although the said *John* did perform, and is still ready and willing to perform his promise and undertaking as aforesaid, yet the said *Elisha*, not regarding his lastmentioned promise and undertaking so by him made in manner and form aforesaid, but contriving and fraudulently intending craftily and subtilely to deceive and defraud the said *John* in this behalf, hath not yet paid to the said *John* the said last mentioned sum of eight hundred dollars nor any part thereof, nor hath he accommodated the said *John* with a convenient lodging room, nor provided for his use the bed, bedding and fuel as aforesaid, although often requested so to do. But the same to do hath hitherto wholly refused &c.

Ingersoll for the plaintiff in error. The damages being assessed generally upon the whole declaration, if any one of the counts is bad, the judgment must be reversed. *Grant v. Astle (a)*. The second count lays a contract on the 8th day of *July* 1805, to pay the plaintiff eight hundred dollars *per annum*, to provide a lodging room &c., and charges the

breach of the contract in not paying the eight hundred dollars, &c., when the year did not expire, and of course the money did not fall due, until more than four months after the action was brought. It appears therefore that the plaintiff has recovered damages for the nonpayment of a sum which by his own shewing was not due. The case of *Hambleton v. Veere* (a) is decisive. There the plaintiff declared for procuring his apprentice to depart from his service, and for the loss of his service *for the whole residue of the term of his apprenticeship*, which was not expired at the commencement of the action; and general damages being assessed, the judgment was arrested. *Acton v. Eels* (b) to the same point. It is an established principle, that where it is expressly averred in the declaration, that the plaintiff has sustained damages from a cause subsequent to the commencement of the action, and general damages are given, the judgment is erroneous. It cannot be intended that the damages are assessed for only that matter in the count which is actionable, as for not finding the lodging room, bed and fuel; for it is to be taken that they are assessed according to the declaration. Nor can it be intended that damages were given for only so much of the money as was due before the suit; because in the first place nothing was due, it not being stated as in the first count, that the money was payable quarterly; and in the next place, if the declaration is not the guide, it is wholly uncertain what rule the jury have followed. Unless it is to be taken that they have found the whole, there is nothing in this count, that would prevent the plaintiff from bringing a second action, and recovering the eight hundred dollars again.

Hopkins and S. Levy for defendant in error. The rule of reversing a judgment after a trial of the merits, where the damages have been assessed generally, and one of the counts happens to be bad, is so unreasonably severe, that the court should make almost any intendment to get over it. The action of *assumpsit* is now so liberally used, that where an entire contract is made to pay money by instalments, or to do several things at different times, this action may be brought as

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(a) 2 Saund. 169.

(b) 2 Salk. 662.

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soon as the contract is broken in any respect; and although some doubt seems to be expressed by Lord *Loughborough* in *Rudder v. Price* (a), whether the whole sum may be recovered upon default of paying the first instalment, yet it was expressly so ruled in *Beckwith v. Nott* (b); and in *Milles v. Milles* (c), where the whole sum was given in damages, the court, to support the judgment, said they would intend that the damages were given only for the first breach. Here the contract is stated to be entire, to pay the eight hundred dollars, and to provide a lodging room. Not finding a room, was a breach of the contract, which entitled us to the action at once, although the money had not become due; and the court will presume that the damages were given for this breach only. If however, as is said in some of the cases cited in *Rudder v. Price*, the contract is extinguished by the judgment in the action for the first breach, then we were entitled to damages for the whole matter in the second count, and an intendment that they were given for the whole, does us no harm. The contract being entire, the plaintiff could not have laid the part only that was broken, without being subject to a nonsuit; and if he is defeated by laying the whole, it follows, contrary to all authority, that he could bring no action, until the contract was broken in every part. But further, the defect in the count, if any, is cured by the verdict. The court might have listened to the objection upon a demurrer; but after verdict, every legal intendment is to be admitted in its support. *Weston v. Mason* (d), *Roe v. Haugh* (e), *Bayard v. Malcolm* (f), 1 *Crompt. Prac.* 499. 2 *Tidd* 826. It does not appear at what time the year was to commence, although the contract was made in July 1805. The plaintiff is stated to have already at that time undertaken the defendant's brewery; and it may well be intended, that the year was to run from a previous day, to wit, the day of his undertaking; and as the issue was such as to require proof on the trial that the annual payment was due, the court must presume after the verdict, that such proof was given. 1 *Saund.* 228 a. *Bayard v. Malcolm* (g). But if from the mode of laying the annuity, nothing could be recovered on

(a) 1 *H. Black.* 547.(b) *Cro. Jac.* 504.(c) *Cro. Car.* 241.(d) 3 *Burr.* 1725.(e) 1 *Salk.* 29.(f) 2 *Johnson* 554.(g) 2 *Johnson* 456.

that account in this action, then as the count clearly contains a good cause of action, the court will presume that the jury gave damages for the actionable matter only. *Steele v. Lock Navigation* (a). The defect moreover is cured by the 6th section of the act of 21st March 1806, 7 St. Laws 562.

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Ingersoll in reply. The cases of *Rudder v. Price*, *Beckwith v. Nott*, and *Milles v. Milles*, do not in any manner touch the point in controversy. The question is not whether *assumpsit* does not lie upon the breach of a simple contract in any respect, nor whether the plaintiff is not bound to state his whole contract; but whether when he states, and claims damages for a breach of the contract in a particular in which, by his own shewing, it could not have been broken when the action was brought, a general verdict must not be intended to include damages for the whole matter, both that which accrued before, and that which, if at all, accrued after. And there is not a case to the contrary. All the authorities cited by *Serjeant Williams* in 2 *Saund.* 171 c. are express to the point, and that a judgment in such a case is erroneous. The court will intend after verdict, what is necessary to supply a title defectively stated; but where no title whatever is stated, *à fortiori* where the plaintiff's title is negatived by himself, no intendment is made, because it would be either contrary to the record, or would be the very foundation of his action; and it does not appear, that that part of the contract which was to be performed after the action brought, was not performed punctually by the defendant, notwithstanding the jury have given damages for the breach of it. The act of 21st March 1806 goes no further than to allow amendments during the trial; in the Common Pleas, it is not held to authorize them after the jury is sworn. [TILGHMAN C. J. I have allowed amendments under that act after the jury were sworn. BRACKENRIDGE J. I have done the same.] So I understand the practice in this court to have been. But the act amends informality merely, not substance; and leaves the matter of error as it stood before.

TILGHMAN C. J. delivered judgment.

The error assigned in this case appears on the face of the

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declaration. There are seven counts, to only one of which, (the second) an objection is made. In this count it is stated that on the 8th *July* 1805, the plaintiff, at the request of the defendant, had undertaken and did superintend the defendant's brewery, and did instruct the defendant's son in the art of brewing, in consideration whereof the defendant promised to pay him the sum of eight hundred dollars per annum, and to provide for the said plaintiff a convenient lodging room with bed, bedding and fuel, at the cost and expense of the said defendant; and although the plaintiff did perform, and was ready and willing to perform, his promises and undertakings, yet the defendant had broken his assumption in this, that he had not paid to the plaintiff the said sum of eight hundred dollars nor any part thereof, nor had he accommodated the plaintiff with a convenient lodging room, with bed, bedding and fuel as aforesaid. This action was brought to *March* term 1806. The exception is, that by the plaintiff's own shewing, the sum of eight hundred dollars was not due, till after the action brought, and yet he has recovered damages for the nonpayment of it. On the other hand, the plaintiff contends, that although the damages were assessed generally, yet in as much as this count contains a good cause of action, independent of the eight hundred dollars, viz. the not finding him a room, with bed, &c. it shall be intended that the damages were given only for those things for which there was cause of action at the time the suit was commenced. We are always anxious to support a verdict on the merits of the case, and have examined the authorities which were cited on the argument, with a wish to affirm the judgment if possible. But we find them too strong to be got over. It has been said in general, that where a count contains matter of various kinds, some good, some bad, it shall be intended that the damages were given only for what was good. But many errors arise from the application of general sayings to particular cases, to which they are not adapted. The dictum which I have mentioned, is applicable to actions of slander, for a special reason. A case is mentioned in 10 *Co.* 130. where an action was brought for calling a man an errant knave, a cozenor, and a traitor. The action was supported after verdict for the plaintiff, because altogether it is but one

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scandal, the words being all spoken at one and the same time. In such a case the plaintiff is obliged to lay the words as spoken, and it shall be intended that the jury paid no regard to any but the actionable words. This principle is adopted, and more fully explained, in the case of *Lloyd v. Morris*. (*Willes' Rep.* 443.) There, the words were "you are a pick-pocket and murderer; you stole a guinea from *A*; you killed his cattle, and murdered his child." The charge of killing cattle is not actionable; but the court said; it was necessary for the jury to find the defendant guilty of the whole or none; and if judgment must be arrested, a man, by speaking words not actionable and words actionable together, will secure himself from an action. But we shall find the law to be very different, where the plaintiff introduces into his declaration, matter for which, on his own shewing, there was no cause of action, and which he had no occasion to introduce. Such was the case of *Poles v. Osborne*, cited 10 Co. 130. b. It was an action of trespass for breaking the plaintiff's close, and beating his servant, without adding *per quod servitium amisit*. The breaking of the close was a good cause of action; yet the judgment was arrested, after verdict and entire damages assessed. The case of *Clifford*, is also cited in 10 Co. 130. b. *Clifford* brought a writ of *ejectione custodiæ terræ et hæredis*. Damages were assessed generally, and the judgment would have been arrested, because an action did not lie for the custody of an heir, but the plaintiff released all the damages, and took judgment of the ejectment of the land only. These cases prove that the court cannot legally presume that the damages were given only for that matter which was actionable. It is unnecessary to cite other authorities, though many might be produced in support of the same principle. In the case before us, the plaintiff was obliged to set out the whole contract; but he was not obliged to assign as a breach the nonpayment of money, which from his own shewing could not be due. We must take for granted that the jury gave some, if not the whole, of that money in damages. We are therefore of opinion that the judgment was erroneous, and must be reversed.

Judgment reversed.

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Philadelphia,
Thursday,
January 11.

GUIER surviving executor of **GEORGE COOPER**
against **KELLY** and Wife.

APPEAL from the Orphan's Court of *Philadelphia* county.

An executor who receives the surplus proceeds of his testator's land which has been sold under execution, is chargeable with them in account as executor, notwithstanding he is husband of the devisee of one half the estate, and claims to have received them in that character.

If an executor purchase the real estate of his testator at sheriff's sale, and it is afterwards sold again, in consequence of his not adhering to his purchase, he is chargeable in account with the largest of the two sums at which it was struck off.

2 B	294
21 SC	206
2 B	294
209	219

The account of the appellant, as executor of *George Cooper*, having been settled by auditors, and a *pro forma* decree in confirmation of the report having been rendered by the Orphan's Court, he entered the present appeal, and filed seven exceptions to the decree.

The *first*, which was the only material exception, was as follows. "For that in the account returned to the said Orphan's Court by the said auditors, and annexed by them to their report in the said cause, the said auditors have charged the appellant with, and the Orphan's Court have allowed the charge of, the sum of *eight thousand three hundred and twenty dollars* as the price at which the house of the said *George Cooper*, situate &c., sold at, and ought to be accounted for by the said executor, when in truth and in fact the sum received therefrom by him was but *seven thousand two hundred and twenty-five dollars*, and the said appellant ought not to have been charged with any other or larger sum." The *second* exception, which was to a charge against the appellant for rent received from some real estate of which *Cooper* died intestate, was allowed by the appellees. The *third*, *sixth*, and *seventh*, were exceptions to the rejection of certain credits claimed by the appellant, which he gave no evidence in this court to substantiate. The *fourth* was to the rejection of a credit for groundrent due by the estate of *Cooper*, and paid by the appellant, part of which was due at *Cooper's* death, and part accrued afterwards; and this exception was allowed as to the first part by the appellees, and waived as to the residue by the appellant. The *fifth* was to an overcharge of interest, which was matter of calculation.

The facts which bore upon the *first* exception were these: The house in question was devised by *Cooper* to his two daughters, the wife of the appellant and her sister, in fee as

tenants in common, the latter of whom died before the testator, and of her moiety he died intestate. At his death he left two children, and the issue of two who were dead; so that the wife of the appellant was entitled to five eighths of the house, one half by the devise, and one fourth of the residue under the intestate law. *Cooper* left other real estate to a considerable amount; but under a judgment obtained against him in his lifetime, the house alone was taken in execution and sold by the sheriff. At the first sale a perfectly good offer of 8300 dollars was made to the sheriff, upon which the appellant bid 8320 dollars, and it was struck off to him. *Guier* did not comply with the terms of sale; and it was put up a second time, and bought for 7225 dollars, by the same person who at the first sale bid 8300 dollars.

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Levy for the appellant argued, that the proceeds of the house should not in any shape have been introduced into the account of the executor. His office exclusively concerns the personalty of the testator, unless he is invested by the will with power to sell; and even in that case he is more a trustee than an executor, and subject to account in the former, rather than in the latter capacity. But in the present instance, the land was sold under execution, and the proceeds have come to him not as executor, but as the husband of a devisee and representative. Under what principle have the appellees admitted the *second* exception, unless upon this, that what the appellant has not received as executor, he cannot as executor be charged with. If indeed he had not been entitled to take the money except as executor, there might be some reason for the charge; but when at the same time he has no right to it in this character, and has a right to it in another, how can it be argued that his rightful receipt of it should be negatived, to make him account for it in a wrongful capacity? It would be serious injustice to him; because if he brings it into his account, he must sue the other devisees for a contribution, as his wife's part of the estate will have paid more of the debt than it ought to, five eighths instead of a fourth. The proper course in such a case, is to leave it with the devisee to whom it has been paid, subject to the suits of other devisees, if they have a right to a portion of it. But

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the difference between the sum actually received, and the sum for which the house was first sold, is a still more exceptionable charge. An executor is not to be debited with what the property might have brought at public sale, but with what it did bring. If he has been guilty of negligence or malconduct, the remedy is by an action for damages. *Guier* did not bid for the house either as executor or devisee, but as any other individual; and if he failed to perform his contract, either the sheriff or the devisees should sue him for the breach of it. Neither the Orphan's Court, nor this court upon an appeal, have any jurisdiction of a question of this sort. They are respectively confined to the obligations and rights of the executor, in relation to his conduct as such; and if they can debit his account with an item of damages for breach of a contract which he individually made with the sheriff, it will follow that every contract in relation to the estate, by the person who happens to be executor, with any of the devisees, may be made the subject of an account.

C. J. Ingersoll and *Hopkinson* for the appellees, said that whatever might be the fate of the exceptions, this court, they understood, would merely set the account right, and not send it back to the Orphan's Court. [TILGHMAN C. J. If there are errors in the account, this court will settle them like the Orphan's Court, and not set aside the whole account reported. The auditors are merely clerks.]

They then argued, that the first exception admitted the receipt of 7225 dollars by the appellant as executor, and that he ought to be charged with it; of course all that had been said of his receiving it in another character, came too late. But independent of this, there was a radical defect in the opposite argument, in this particular, that it supposed the house to have been sold as the property of the devisees, whereas it was sold as the property of the testator, and converted into money, the overplus of which beyond the debt, the sheriff was bound to pay to the executor who represented the defendant in the execution. 1 *St. Laws* 67. section 7. The case of *Tohe v. Barnet* (a) shews, that when real estate

(a) 1 *Binn.* 358.

is sold under the authority of an act of assembly, it becomes personalty, and goes as such. The executor is bound to pay it to those who would have the realty; but he pays it as executor, in the same manner as he would pay a legacy. The rule of the *English* law has never governed the practice in *Pennsylvania* in cases of this kind. Lands are in this state considered as chattels for the payment of debts. They are taken in execution under judgments either against the testator or executor; and as the latter is bound to pay all debts, whether the heir is made liable by the contract or not, the fund, whenever it is converted into money by execution, should pass through his hands. Such has universally been the practice; and it is certainly most convenient that all the money of the estate, however raised, should take this direction, that the fund for payment of debts may be at the disposal of the person who is bound to liquidate them. The objection to the charge of the sum for which the house was first sold, is also founded in a misapprehension. We do not claim the difference as damages for the breach of contract; but we demand the original sum, without regard to the second sale. *Guier* bought the house for 8320 dollars, and as the same hand that was to receive the money was to pay it, the money is to be considered as received by him. The second sale was for his account and not ours.

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Levy in reply observed, that whatever might be the admission in the first exception, if the court saw that they wanted jurisdiction of the item, no admission could give it to them. Exceptions are merely for the convenience of counsel. The whole account of the auditors is open upon an appeal, and the court, without any exception, may correct the errors of it. As to the right of the executor to receive the money under the act of 1705, that law directs the overplus to the defendant upon the presumption that he was the proprietor of the land at the time of sale; but it cannot apply where the defendant's right is transferred. If the executor has strictly a right to receive it, it would follow that he could take it where he was manifestly insolvent, and there was not a debt to pay.

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TILGHMAN C. J. delivered the court's opinion.

This is an appeal from the Orphan's Court of *Philadelphia* county. The appellant has made seven exceptions to the decree, of which the 1st is the most material. He complains that he has been charged the sum of 8320 dollars, as the price at which a certain house, the property of the testator, was sold; whereas in truth the sum received was but 7225 dollars, and he ought not to have been charged with any other or larger sum. This house was devised to the wife of the appellant, and her sister Mrs. *Seckle*, in fee as tenants in common. Mrs. *Seckle* died in the lifetime of the testator, so that as to her moiety of the house there was an intestacy; in consequence of which, one fourth of that moiety descended to the wife of the appellant. Although the exception admits that the appellant received the price at which the house was sold, yet in the course of the argument his counsel denied that the item was properly chargeable in the account of the executor, because as executor the appellant had nothing to do with the real estate, and this house was sold, not by him, but by the sheriff on an execution against the estate of the testator. This objection is worthy of consideration. By the law of *England*, the price of the house could not be brought into the executor's account, nor would any part of the money have come to his hands. In that country, lands are not chargeable with simple contract debts, nor even with a bond debt, unless the heir is expressly bound. And where the land is chargeable, the action is brought against the heir or devisee, and not against the executor. But in *Pennsylvania* the case is different. At a very early period, lands were made subject to debts of all kinds, and the uniform practice has been, to bring the action against the executor, and judgment being obtained against him, to levy on the lands in the hands of the heir or devisee. It has also been the practice in case of an execution against lands, to pay the surplus beyond what will satisfy the execution, to the executor, in whose hands it is assets for the payment of other debts. This practice is very proper and very convenient; because, until the administration account is settled, it cannot be known what debts against the testator remain unpaid; and if the surplus was returned to the heir or devisee whose land had been sold,

and then other debts of the testator should appear, there would be a necessity for new suits and executions for the purpose of selling other lands, by which the estate would be subject to heavy costs. It is to be understood however, that if a devisee, or one of the heirs, loses his lands by an execution, he is entitled to a contribution from the owners of the remaining part of the testator's lands. I do not say, that there may not be cases where, on its being made to appear to the court, that there are no other debts of the testator outstanding, or that the executor is in insolvent circumstances, the court might think it proper to order the surplus money to be paid to the heir or devisee. But that is not the present case; for the appellant has confessed by his exception that the money has been received by him, and it is an exception not to be favoured, inasmuch as it only tends to turn the appellees round to another form of action. I am satisfied that it was right to bring the price of this house into the administrator's account.

But the greatest difficulty remains. The fact was that when the house was put up for sale by the sheriff, the sum of \$300 dollars was bid by Mr. Stokes. The appellant made a bid of twenty dollars more; and the house was struck off to him. He refused to comply with his contract, in consequence of which the sheriff made a second sale, and the house went off at only 7225 dollars, the difference between the first and second sale being one thousand and ninety-five dollars. With this difference the appellant was charged by the Orphan's Court; and he excepts to it, because it is the proper object of an action at law, in which damages might be recovered for breach of contract. But this transaction seems so interwoven with the price of the house, that it may be considered as an accessory to it; and the Orphan's Court having jurisdiction of the one, will likewise have it of the other. The actual price of the house cannot fairly be ascertained, without taking the whole matter into consideration. The Orphan's Court, in matters within their jurisdiction, proceed on the same principles as a Court of Chancery. Their powers under our acts of assembly are very extensive. I think it cannot be doubted but a Court of Chancery would charge a trustee with a sum of money lost by such conduct.

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in the sale of an estate. If a trustee purchase an estate which is entrusted to him to sell, his purchase will be declared void, and a new sale ordered. If the second sale produces more than the first, he must account for it; but if less, he is chargeable with the difference. He is not suffered to say that the estate was not worth what he agreed to give for it. This is the principle which the Orphan's Court have adopted, and I cannot say that I disapprove of it. Mr. *Stokes* has proved that his bid was within twenty dollars of the appellant's, and he was ready to pay the money. It is evident therefore, that the appellant did in fact prevent the receipt of *Stokes'* money. Upon a view of all the circumstances of this case, I am of opinion that the first exception has not been supported.

The 2d exception is allowed by the counsel for the appellee.

The 3d, 6th and 7th exceptions are founded on matters of fact, which it was incumbent on the appellant to prove. He has produced no evidence, and therefore these exceptions stand unsupported.

The 4th exception is waived by the appellant, except so far as concerns the amount of groundrent due at the death of the testator, as to which it is allowed by the appellees.

The 5th exception relates to the charge of interest. If the parties cannot adjust it themselves, the court will direct it to be settled on the principles laid down in the case of *Wilcock v. Fox* (a).

NEILSON *against* MOTT.

IN ERROR.

1810.

Philadelphia,
Thursday,
January 11.

UPON a writ of error to the Common Pleas of *Philadelphia* county, the case was as follows:

The action was brought upon a promissory note dated the 30th *January* 1804, by which *Neilson*, the defendant below, promised to pay to the plaintiff or his order, *one day after the conclusion of the drawing of the extra class of the Easton Delaware Bridge Lottery*, twelve hundred and fifty dollars, without defalcation, for value received. The declaration contained an averment, that "the conclusion of the drawing of the said extra class of the Easton Delaware Bridge Lottery did afterwards happen and take place, to wit in the county aforesaid on the 31st day of *December*, in the year of our Lord one thousand eight hundred and five; by reason whereof and by force of the statute &c."

Upon the trial of the cause, it was proved that the note was given for five hundred lottery tickets in the abovementioned lottery, which was authorized by an act of assembly of the 4th of *April* 1798. 4 *St. Laws* 278. By the 4th section of that act, the drawing was under the superintendence of five commissioners, appointed by the governor, who were sworn or affirmed diligently and faithfully to perform the duties entrusted to them, and who *certified* and testified that the drawing finished on the day laid in the declaration. The lottery contained fifty thousand tickets. In each wheel there was the same number of pieces of paper; that is, fifty thousand tickets or numbers in one wheel, and in the other, fifty thousand pieces of paper designated as blanks or prizes; and at the close of the drawing, the papers came out even from the two wheels. In the wheel containing the numbers of the tickets, the numbers of thirty-nine tickets were omitted, and in the same wheel there were duplicates of thirty-nine numbers. Of the thirty-nine omitted numbers, nineteen of the tickets corresponding with them, were held at the conclusion of the lottery by the plaintiff; and he had made satisfaction to the holders of the residue, with the exception of four or

The defendant purchased of the plaintiff five hundred lottery tickets, for which he gave his promissory note payable one day after the conclusion of the drawing of the lottery. There was an irregularity in the drawing, caused by inserting in one wheel thirty-nine numbers twice, and omitting thirty-nine numbers altogether; but none of the defendant's numbers were omitted, all the prizes were duly paid, and he never offered to return any of the tickets purchased by him. Held that it was not competent to the defendant to resist the payment of his note, upon the ground that the lottery was not legally drawn.

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five, all of whom by public advertisement he had offered to indemnify. But none of the tickets corresponding with the omitted numbers, were among those for which the note was given by the defendant, *all the defendant's tickets having corresponding numbers in the wheel, and one of them a duplicate number; nor had the defendant ever returned or offered to return to the plaintiff, any of the tickets so sold to him.* All the prizes drawn in the lottery, were duly paid by the plaintiff. A day or two before the last day's drawing, the wheels were opened for examination by the commissioners, as was proved to be usual in the case of other lotteries, and the number of tickets in the respective wheels found to be equal; and as the commissioners discovered that there was one number omitted, and another put in twice, they altered one of the duplicates to the number omitted, under the conviction that it had been intended for that number; but they acknowledged that they had not known an instance of such an alteration in any other lottery. The plaintiff was the proprietor of the lottery by purchase from the Easton Delaware Bridge Company. He put up the tickets, and the numbers, blanks, and prizes were made out under his direction.

Upon this evidence, the defendant's counsel requested the court to charge the jury, that the matters produced and proved were sufficient upon the whole case to bar the plaintiff of his action; but the court on the contrary delivered their opinion, that they were sufficient to entitle the plaintiff to recover, and sealed a bill of exceptions.

Condy and Peters for the plaintiff in error, argued that the event upon which the note was payable, was not the termination of the drawing *de facto*, but of the regular and legal drawing of the lottery; and that such irregularities, caused by the plaintiff, had occurred in this drawing, as vitiated all the proceedings, and made them in point of law a nullity. The act which authorized the lottery contained no scheme; but it sanctioned only that scheme which should be approved by the governor; and if any other scheme was adopted, or there was a variation in any particular from the approved scheme, the drawing was illegal. Now it is manifest that the omission of thirty-nine numbers altogether, the insertion of thirty-nine duplicates, and the change of a number after the

drawing had commenced, was no part of that scheme of the lottery which was authorized by law. It was however a part of the scheme upon which the lottery was drawn, whether intended or not; and this variation must be fatal, because it made it a new lottery. The most strict conformity to law is essential to the validity of a lottery, since all lotteries are illegal unless particularly sanctioned by the legislature. The certificate by the commissioners does not prove that the lottery was drawn; they were not competent to give such certificate; and at most it could only mean that the wheels were exhausted, and the drawing finished in point of fact. The drawing was not fair even as to the defendant; because there being two numbers in the wheel corresponding with one of his tickets, if one had drawn a blank and the other a prize, the uncertainty of his title might have prevented a recovery. Nor was he bound to return the tickets on hand. He was entitled to retain them until the lottery was fairly drawn.

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Hopkinson and *Ingersoll* for the defendant in error, answered, that the act of assembly, having placed the drawing exclusively under the superintendence of commissioners, who were sworn to do their duty, made their certificate conclusive that the drawing was finished. But that, independent of this evidence, there was enough to shew that no such irregularity had occurred as could vitiate the drawing, or at least none of which the plaintiff in error could take advantage. To vitiate a lottery there should either be fraud, or some fundamental error that affected the whole scheme; mistakes in so extensive a lottery must inevitably occur. There is no pretence of fraud; for the plaintiff who is said to have been the author of the mistake, held nineteen of the omitted tickets himself. There was no error that deranged the whole scheme; for every ticket, except the few omitted, had identically the same chance of prize or blank, as if all had been inserted. Those only whose tickets did not participate the chance of a prize, were injured; and an indemnity has been given to most, and offered to all of them. But if there was irregularity, the plaintiff in error cannot set it up. All his tickets had the full benefit of the lottery; one had a double chance, for no person could claim the prize to either the original or duplicate number but himself. He has re-

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tained all the tickets, or sold them and received the money. The prizes drawn to their respective numbers have been paid. He has not received the least imaginable injury from the mistake. And it is therefore monstrous that he should be permitted to affirm the drawing for all purposes beneficial to himself, and to disaffirm it for all that are beneficial to the defendant in error. As to these parties the drawing is legally concluded.

TILGHMAN C. J. This action was brought on a note by which the defendant promised to pay to the plaintiff twelve hundred and fifty dollars, one day after the conclusion of the drawing of the extra class of the Easton Delaware Bridge Lottery. This lottery was made by authority of an act of assembly passed the 4th April 1798. It was drawn under the superintendence of five commissioners appointed by the governor, who took an oath for the faithful performance of their duty; and those commissioners have certified that the drawing of the lottery was completed. The first question that occurs is, whether the defendant is estopped by the certificate of the commissioners from shewing that the lottery was not drawn. I do not think he is. There is nothing in the contract of the parties which refers the decision of this fact to the certificate of the commissioners. It is to be proved like all other facts, to the satisfaction of the jury. The fact is however that the lottery was drawn, although it appears that considerable irregularity took place. If this irregularity had in any manner prejudiced the chance of the tickets purchased by the defendant, (for which the note in question was given) I should be of opinion that the plaintiff could not recover. But that does not appear to have been the case. All the defendant's numbers were put into the wheel containing the numbers, and every thing was right in the wheel containing the blanks and prizes. The defendant indeed had one duplicate ticket, but in that he suffered no injury; he rather had an advantage, as it gave him a double chance for a prize. All the prizes drawn in this lottery have been paid. If the defendant had drawn the highest prize he would have been entitled to it, and no doubt he would have taken it. It is unfair that he should have enjoyed the full chances that he contracted for, and yet not be obliged to pay

for them. At the same time I think it would have been more prudent in the commissioners to have stopt the drawing, the moment they discovered the irregularity which had taken place. They had a right to do so, and to begin the business anew. But as they thought proper to complete the drawing, as the fortunate adventurers have received their money, and the only persons who were really injured, (those whose numbers were left out of the wheel) have acquiesced, I do not think it is competent to the defendant, who has suffered no injury, to withhold payment of his note on the ground that the lottery was not drawn according to law. I am of opinion that the judgment be affirmed.

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YEATES J. It appears by the bill of exceptions, that the plaintiff below, having become proprietor of the extra class of the Easton Delaware Bridge Lottery, by purchase from the company, sold five hundred tickets therein to the defendant below, who gave him a note for twelve hundred and fifty dollars, payable one day after the conclusion of the drawing of that class. The single question is, whether the drawing of that class of the lottery was concluded before the commencement of the suit?

The bill of exceptions states that the number of tickets in one wheel, exactly corresponded with the number of prizes and blanks in the other wheel. But it so happened, that in the former wheel the numbers of thirty-nine tickets were omitted, and instead thereof the numbers of thirty-nine other tickets were put in twice. Of the omitted numbers nineteen belonged to *Mott* at the conclusion of the lottery, and he had satisfied the holders of the remaining twenty, (except four or five) whom he had advertised to come in. None of the omitted numbers belonged to *Neilson*; but all the tickets sold to him for which the note was given, had their corresponding numbers in the wheel. He had never returned, nor offered to return, to *Mott*, any of the tickets which he had procured from him, and all the prizes drawn in the lottery have been duly paid by *Mott*. The commissioners who superintended the drawing, have acquitted him of every species of fraud in the whole transaction.

It has been objected that the drawing of the lottery was irregular, and that to do the adventurers justice, it ought

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to appear that the entire scheme of the lottery had been strictly pursued. It is admitted that there has been a mistake in having thirty-nine duplicates, instead of the thirty-nine numbers omitted. But *Neilson* was not interested in any of the omitted numbers, and has no reason to complain on that score. As to him the transaction throughout was fair. As he was the proprietor of none of the omitted numbers, it is selfevident that his chance of success was not in the least impaired by the mistake. His prospect of gain was built on the proportion of five hundred against fifty thousand when he bought his tickets, and this ratio was in nowise altered by misnumbering other thirty-nine tickets to which he had no claim. If he possessed a duplicate ticket, the chance was in his favour, for he obtained thereby a double chance of a prize for a single ticket.

The certificate of the commissioners is evidence of the conclusion of the drawing of the extra class of the lottery; but in my idea not conclusive. Proof might be given that the transaction was unfair and fraudulent. If it could be collected from the circumstances of this case, that such had been the conduct of *Mott*, or that the scheme of the lottery had not been pursued in such a manner as to give *Neilson* all the advantages of fortune which the original plan contemplated, I should have no hesitation in pronouncing that there could be no recovery on this note. It is not competent to the plaintiff in error in my idea, to sustain objections which might be made by the four or five holders of omitted tickets, who are yet unsatisfied. The fortunate adventurers it is certain, would never agree to have the lottery drawn over again, and thus exchange a certainty for an uncertainty; and as to *Neilson*, who has had every chance to which he was entitled, he can insist on no such thing. Besides, he must either affirm or disaffirm his contract *in toto*. He has neither returned nor offered to return any of the tickets purchased by him. *All the prizes* in the lottery have been duly paid; meaning, as I presume the bill of exceptions does, that *Neilson* has got credit for the prizes drawn by the fortunate tickets, held by him when the lottery was drawn; and that those to whom he has sold tickets which have drawn prizes, have received their money. Under such circumstances it is idle to suppose that the lottery can be drawn over again. Shall then the plaintiff in error hold the prizes, and the prices for which he

has sold a certain portion of his tickets to others, (who have also received their prizes) and yet make no compensation to the proprietor of the lottery for his tickets? I should think it against all reason and good conscience. The terms of the extra class of this lottery *as to him*, I think, have been fully complied with, and conclude upon the whole matter that the judgment of the Court of Common Pleas should be affirmed.

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BRACKENRIDGE J. I take it the certificate of the commissioners, that the lottery was drawn, or the drawing finished, is not conclusive evidence that the drawing was according to the scheme, and in all things regular, so that any one interested in the lottery is barred from shewing the contrary. If so, the question drawn or not drawn is open for examination. For it is one thing to be drawn in the idea of the commissioners, and another thing to be drawn in contemplation of the law. Actual drawing and legal drawing are two different things. That the lottery is finished drawing, and that it has been drawn properly, are not the same. If so, the drawing in this case would not seem to me to have been regular, and it is competent to us to examine, for the mode and manner of the drawing is made a part of the case stated to us.

The omitting to put certain numbers in the wheel, the duplicates of other numbers in their stead, and the changing a duplicate of one number and putting in a number for which it was supposed it was intended, a day or two before the drawing finished, were great irregularities. It does not appear to me allowable to shew that the error could not have affected the fortune of a ticket; for that involves a calculation of chances, to the uncertainty of which a holder ought not to be subjected. Nor will it be allowable to shew that the fortune of a ticket was not affected; for it is not in the power of the human mind to ascertain, what might have been the fate of a number accompanied with other numbers, or in other words what might have been the disposition of Providence in favour of a number, had other numbers been in the wheel, which ought to have been in. But a complaint on this ground may be waived, and it will not be in the mouth of any one to consider it as drawn for one purpose, and not for another; as for instance, to take a prize drawn under it, and at the same

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time refuse to pay for another ticket which has been drawn a blank. Now the defendant had purchased a number of tickets and retained them. He has returned none. It is presumable he has drawn prizes for some of those. Shall he not pay for the whole, on the allegation that the lottery is not yet drawn, or the drawing finished? He is estopped in my opinion from being heard on this allegation. He has waived the irregularity, and has not considered the drawing void. *Qui sentit commodum, debet sentire et onus*. He cannot be admitted to affirm and disaffirm at the same time. He has acquiesced in the drawing so far as to retain the tickets purchased, and it seems to me ought to pay for them as he had promised or bound himself to do. So that I differ a little as to entering into the consideration of whether injury would have resulted from the irregularity of the drawing. Yet I concur in affirming judgment, on the ground of waiving the objection by retaining the tickets.

Judgment affirmed.

The Phoenix Insurance Company *against* PRATT and
CLARKSON.

Philadelphia,
Thursday,
January 11.

IN ERROR.

If the general agent of neutral cargo covers belligerent property in the same vessel, though without the consent or knowledge of his principal, the property of his principal is liable to condemnation, notwithstanding it is plainly distinguished from the covered property by bills of lading and invoices on board; and the underwriters on that property, if warranted neutral, are discharged, either upon the ground that the warranty has not been performed, or that the risk has been increased by the agent of the assured.

THIS was an action of covenant, brought by the defendants in error in the Common Pleas of *Philadelphia county*, upon a valued policy of insurance dated the 25th of *May 1805*, upon goods on board the ship *Charles, Richard Stites*, master, at and from *Havanna* to the island of *St. Thomas*; 7000 dollars at seven and a half per cent. The policy contained a warranty that the vessel and goods were *American* property, to be so proved in *Philadelphia* only; and the declaration averred the loss to be by capture by the *British*

No advantage can be taken, by bill of exceptions, of an erroneous opinion on a point of law, immaterial to the issue; but the plaintiff in error may assign error in an opinion on any point material to the issue appearing on the bill of exceptions, although it was not particularized in stating the exceptions below.

brigantine of war *L'Epervier*, by whom the *Charles* was carried into *Tortola*, where vessel and cargo were libelled and condemned as prize.

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The cause came before this court upon a bill of exceptions to the charge below, in which the whole evidence on both sides was set out, together with the opinion of the court at large.

The ship *Charles* belonged on the 6th October 1804 to *Richard Stites*, the master, a native *American*, who on that day in consideration of 800 dollars, made a bill of sale of two thirds of her to *Pratt* and *Clarkson*, the plaintiffs, also native *Americans*; and he afterwards made to them a bill of sale of the remaining third, which was intended as a security for 366 dollars due by him to *Clarkson*, and 869 dollars due to *Pratt*.* The ship sailed from *Philadelphia* on the 12th November 1804 bound to *St. Kitts*, with a cargo, invoiced at 5786 dollars and eighteen cents, consisting of beef, pork, corn meal, shooks, hoops, shingles and staves, the whole of which belonged to the plaintiffs; and it was consigned to *Stites* the master, and *Isaac Thomas* a young man on board, as joint supercargoes, with instructions to proceed in the first place to *St. Kitts*, and there to sell the cargo; but if sales of the whole could not be effected, then to proceed to *St. Thomas*, and sell the remainder of the cargo together with the ship; and if that could not be done, to go elsewhere; with very full powers both as to the sale and purchase of cargo, and to the forming of plans for the lucrative employment of the ship. The *Charles* arrived at *St. Kitts* about the 22d December 1804, where almost all the outward cargo was sold excepting twenty-five barrels of beef and the shooks, and produced exclusive of freight and charges, 5831 dollars eighty-five cents, of which a small part was sent home in molasses, a part was left in the hands of a merchant to be remitted, and 4716 dollars and forty-nine cents was invested in eighty puncheons of rum: about 750 pounds currency was paid to the supercargoes in cash. With this cargo the vessel proceeded to *St. Thomas*, where she arrived in February 1805.

* The ship had probably been repaired in the mean time, so as to increase her value.

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The rum and beef were there sold, and an invoice of dry goods, wine, &c. to the amount of 5225 dollars fifty cents was purchased with the proceeds, and shipped in the *Charles* for *Havanna*, in the name and for the account and risk of the plaintiffs. At the same time, *Stites* took on board in his own name an invoice of dry goods, and 670 doubloons, worth 11300 dollars, and then proceeded to the *Havanna*. The invoice of the plaintiffs there netted 5478 dollars, which was invested in 150 boxes white and brown sugars; and the invoice and gold of captain *Stites* netted 17623 dollars, which was invested in 350 boxes of sugars, and 27 bales of beeswax. The former were invoiced and shipped on board the *Charles* in the name and for the account and risk of *Pratt and Clarkson*; and *Stites* signed bills of lading in their name deliverable to himself at *St. Thomas*. The latter were invoiced and shipped in the name of *Stites*, and for his sole account and risk. To the plaintiffs' bill of lading was annexed an affidavit of *Hernandez*, of the house of the widow *Poe*y and *Hernandez*, who made all the sales and purchases of the cargo, that the property was for the sole account and risk of the plaintiffs, and that no citizen or subject of any of the belligerent powers had any interest therein. To the bill of lading of *Stites*, an affidavit by himself was annexed to the same effect. The *Charles* sailed with this cargo for *St. Thomas* on the 12th of *April*, and was captured on the 9th of *May* by the brigantine *L'Epervier*, and carried into *Tortola*. On the 11th *May*, *Stites* wrote to the plaintiffs that there was no doubt the vessel and cargo would be condemned, and recommended an abandonment, which was accordingly made on the 8th of *June*. On the 3d *June* the judge of vice-admiralty pronounced the vessel and cargo to have belonged at the time of capture to enemies of the crown of *Great Britain*, and as such or otherwise liable to condemnation, and condemned the same accordingly as good and lawful prize.

By the proceedings in the vice-admiralty, which were given in evidence by the plaintiffs, it appeared that the captain in answer to the standing interrogatories, swore that the plaintiffs were laders of all the cargo that was put on board at *Philadelphia*, and owners of the greatest part; and that he owned the rest. That they owned 150 boxes sugar at the

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time of the capture, and that all the rest of the lading belonged to him. That he knew the lading so belonged, from its being the returns of the cargo carried out, *of which a part, to the amount of seven or eight thousand dollars, was sold at St. Kitts, and the rest, to the value of about six thousand dollars, was sold at St. Thomas; that of this, part was carried down to the Havanna in goods, and part in 670 doubloons, added to which, he received about eight or nine thousand dollars at St. Thomas for nankeens he sold there, which were his own property, and which came to him there in the schooner Intrepid; and that if restored, it would belong as aforesaid, and to none others. In his claim he also mentioned two thousand dollars which he took with him from St. Kitts, and which he did not recollect upon his examination.*

No other explanation was given of the source from which the property claimed by *Stites* proceeded, except his own account in the preceding answers. At the same time, in the correspondence with the plaintiffs, which was principally carried on by *Stites* alone, he repeatedly requested them not to let *his poor wife and children want* in his absence. It did not appear whether *Thomas* the assistant supercargo had participated in the shipment of this property, and in one or two of his private letters, he complained that *Stites* kept him in the dark as to the business of the cargo, and seemed to wish him out of the way. But to shew clearly that the account given by *Stites* was false, the defendants produced the captain of the schooner *Intrepid*, who swore that he was at *St. Thomas* in that schooner in the winter of 1805 while *Stites* was there, that he had on board *but 3000 pieces of nankeen, no part of which belonged to Stites*, and that in the two or three voyages he had previously made to that island in the *Intrepid*, he did not carry any nankeens.

The defendants' counsel thereupon insisted, that the matters given in evidence were sufficient and ought to be admitted and allowed as decisive evidence to entitle the defendants to a verdict in their favour. But the court delivered the following opinion to the jury.

“ This is an action brought by *Pratt and Clarkson* against “ the *Phoenix Insurance Company*, to recover 7000 dollars “ insured on goods on board the ship *Charles* from *Havanna* “ to *St. Thomas*. The policy is a valued one; and the plain-

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"tiffs therein stipulate that the property insured is *American*.
 "It is in proof that the property insured at the *Havanna*
 "belonged to the plaintiffs, who are *Americans*; that the in-
 "surance was effected at 7 and a half per cent., and that both
 "vessel and cargo have been taken, and condemned by a
 "*British* court of vice-admiralty at *Tortola*. Two thirds of
 "the vessel were owned by the plaintiffs, and one third by
 "*Richard Stites* the captain. She sailed the 12th *November*
 "1804 from *Philadelphia* to *St. Kitts*, from *St. Kitts* to *St.*
 "*Thomas*, from *St. Thomas* to the *Havanna*, and on her
 "way back to *St. Thomas* she was captured by a *British*
 "vessel of war on the 9th *May* 1805, and condemned a few
 "days after. The reasons assigned for the condemnation of
 "ship and cargo, are singular in the mode of expression. If
 "captain *Stites* actually covered the property of the enemy
 "of *Britain*, the true reason of condemnation is not assign-
 "ed in the sentence of the judge. Both vessel and cargo are
 "condemned as belonging to the enemies of *Great Britain*,
 "and as such or otherwise liable to confiscation. From the
 "mass of papers that have been read, there is not any evi-
 "dence to support the decree, *with respect to the property of*
 "*the plaintiffs*, and the counsel for the defendants have wisely
 "taken another ground to justify the decree of the admiralty
 "court at *Tortola*."

"The extensive commerce and immense naval force of
Great Britain, have given her a commanding influence over
 "the maritime laws of *Europe* for above half a century. But
 "it is not in superior power we are to expect moderation,
 "and at all times a due respect for the rights of others."

"In the discussion of this cause a wide and extensive
 "range has been taken; more so than perhaps was
 "necessary. If the 150 boxes of sugar, the undisputed pro-
 "perty of the plaintiffs, have been legally condemned, they
 "have no right to recover, and the underwriters are dis-
 "charged from their contract. On the other hand, if they
 "have been condemned contrary to the laws of nations, the
 "insured have a right to recover.

"Whether captain *Stites* covered the property of a belli-
 "gerent, is a question of fact enveloped in some obscurity.
 "The bills of lading and invoices at the *Havanna* are ap-
 "parently fair and regular, and carry on the face of them no

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" evidence of the charge. The sudden accumulation of prop-
 " erty, is the principal circumstance rested on by the defen-
 " dants to shew, that *Stites* was, at the time of the capture,
 " covering the goods of a belligerent. It is certain he had
 " during the voyage become possessed of a large sum of
 " money, and hence the presumption, that it was the property
 " of an enemy, is urged by the defendants. That the captain
 " had acquired possession of property to the amount of 350
 " boxes of sugar, and 27 bales of beeswax, cannot be con-
 " troverted. *But whether it was belligerent or neutral pro-*
 " *perty is very doubtful, and has not been proved.* When he
 " sailed from *Philadelphia* there is no evidence that he car-
 " ried any money; but there is every reason to believe he
 " did; because he had just sold his share in two thirds of the
 " ship, and mortgaged the other third, the whole amount
 " being 1166 dollars.* He swears too, that he carried from
 " *St. Thomas* to the *Havanna* 670 doubloons. Who owned
 " this sum, from what source it was derived, whether from a
 " neutral, or an enemy of *Great Britain*, is a point on which
 " much observation has been expended, but nothing satis-
 " factorily established.

" It is an acknowledged principle, that the captain, generally
 " speaking, is the representative of the owner, and that in
 " many instances the owner is responsible for his acts. In a
 " voluntary deviation, in case of trespass committed by him,
 " and in case of illicit trade, this is the consequence. The
 " acts of the captain in these cases, are in their nature in-
 " divisible, and their operation cannot be restricted to a por-
 " tion of the property committed to his trust, but must ne-
 " cessarily extend to the whole. But the case before us is not
 " of this sort. Here the owners and the property are clearly
 " distinguishable; and the ship was not engaged in the viola-
 " tion of the laws of nations, or of any treaty.

" The commerce of a neutral with an enemy, except in
 " contraband goods, is certainly lawful. The ship *Charles*
 " therefore, being neutral property, owned by *American*
 " citizens, was not illegally employed between the *Havanna*
 " and the island of *St. Thomas*. They had a right to carry

* The two thirds were sold for 800 dollars, and the sale of the remain-
 ing third was as security for debts to the amount of 1235 dollars.

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“sugar and beeswax from the former to the latter place. No law of nations forbids it. Being a neutral vessel, and liable to be searched, the belligerent had a right to take enemy’s property found on board, but nothing more. If they found property, which in fact belonged to the enemy of *England*, covered by captain *Stites*, it is admitted they had a right to take it; but it is not admitted they had a right to seize and condemn property, which it is acknowledged on all hands belonged to a friend. When I say this, I allude to the 150 boxes of sugar, the property of *Pratt and Clarkson*, and which certainly did not belong to the enemies of *Great Britain*. The general law of nations cannot be altered by the arbitrary ordinances of a single nation. Even the courts of *England* admit, that the concurrence of all nations is required, to produce a change in the law of nations. *The law of nations appears to be, that neither ship nor lawful goods are liable to be condemned by means of unlawful ones, unless when they belong to the same owner, or cannot be distinguished*, which is acknowledged not to be the case on this trial. The insured in the case before the court, have warranted against seizure on account of any illicit or prohibited trade, which must mean trade prohibited by treaties, or the law of nations, not the ordinances of a particular nation. It is true the risk of the insurers cannot be increased by the insured; but that is not the case here, *because by the law of nations the risk of the underwriters is not increased with respect to the property of the plaintiff, by captain Stites taking on board goods belonging to a belligerent*. Every thing usual and agreeable to the law of nations is supposed to be contemplated by both parties at the time of the insurance.”

“Upon the whole, gentlemen, if you are satisfied that captain *Stites* had on board *Spanish* property, and that *Pratt and Clarkson* participated in the act, your verdict should be for the defendants. But if you are of opinion that the captain had *Spanish* property on board, but that *Pratt and Clarkson* had no knowledge of the fact, your verdict should be for the plaintiffs.”

With this direction the cause was left to the jury, who found a verdict for the whole sum in favour of the plaintiffs; and the defendants’ counsel tendered a bill of exceptions to

the opinion, insisting in the usual form, that "the said several documents, matters and proofs, were sufficient in law to bar the plaintiffs' recovery."

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Hallowell and *Rawle* for the plaintiffs in error took three exceptions to the charge.

1. That the proof of enemies' property being covered by *Stites*, was so irresistible, from the sudden acquisition of so large a sum, from his necessity at the commencement of the voyage to mortgage one third of the ship for a small debt, from his repeated requests to the owners not to let his poor wife and children want in his absence, from the falsehood of his account of the cargo in his answers at *Tortola*, and from the want of all possible temptation to disguise neutral property, that the court below were wrong in saying it was doubtful. They should have charged the jury that the evidence was decisive, and that the underwriters were discharged. Both vessel and cargo were warranted neutral, because a warranty of neutral goods was in this case the same as a warranty of neutral cargo; and the excess of funds obtained upon such a voyage, beyond the amount carried out, not being explained, was, in connexion with the preceding circumstances, decisive evidence that the warranty was not performed. *Blagge v. New York Insurance Company.* (a)

2. That the court were wrong in stating the law to be, that neither ship nor lawful goods are liable to be condemned by means of unlawful ones, unless when they belong to the same owner, or cannot be distinguished; for where the goods of an enemy are taken on board and masked by the general agent of neutral cargo, his conduct affects the whole, notwithstanding the sound parts may be distinctly documented, and his principal is answerable to the whole amount of his property on board. If a master, without the knowledge of the ship-owner, breaks a blockade, the ship is forfeited, because the master is the ship owner's agent; and if he is expressly constituted agent of the owners of cargo, or the cargo belongs to the owners of the ship, for the same reason the cargo is forfeited. *The Mercurius* (b). The belligerent property was here taken on board by *Stites* the general agent. It was his

(a) 1 *Caines* 565.(b) 1 *Rob.* 71.

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intention in this part of the transaction "to mislead the " *British* courts of justice, and the *British* cruizers, as to the " property of the cargo;" and upon the effect of such an intention, the opinion of Sir *William Scott* in the case of *The Enderom* (a) is decisive, that let the interests of his employers be what they may, they must be affected by the conduct of the agent, and the consequence will attach on them, to confiscate the property so engaged. In strict law, he says, every supercargo will bind his employer; and although cases may arise where the owner will not be implicated, as where supercargoes have taken in small parcels of goods in contradiction to orders, yet where there is a deliberate interference in the war, by masking a large property of the enemy, this indulgence is not shewn, and the owners who have conferred the power upon the agent, must look to him for redress. The neutral is not at liberty to say, "I have endeavoured to protect the whole, but this part is really my property, take the rest, and " let me go with my own." If he will engage in fraudulent concerns with other persons, *they must all stand or fall together*. *The Princessa* (b), *The Susa* (c), and *The Mars* (d) are all to the same point. In the latter case, Sir *William Scott* says, that whatever the hardship may be, the rule of law is established, that the principal is answerable for the act of his agent, not only civilly, but penally, *to the whole amount of the property under his care*. The case of *Crouillat v. Ball* (e) recognized the same principle. The blending of the property in one bill of lading or invoice is of no consequence. If the agent of the cargo covers property in his own name, it is the same by the law of the admiralty, as if the owner covered it in the agent's name; it is a fraud by the owner himself upon belligerent cruizers, which is punished by the condemnation of all his property. But here was in fact a confusion of property. The agent swore that 150 boxes belonged to the plaintiffs, and the residue to himself; whereas the papers on board, and the whole history of the voyage, shewed that as it respected his own part, the oath was false; and therefore as was decided in *The Rosalie and Betty* (f), the whole of his testimony was discredited, and the property of his employers

(a) 2 Rob. 7.

(b) 2 Rob. 43.

(c) 2 Rob. 214.

(d) 6 Rob. 87.

(e) 4 Dall. 294.

(f) 2 Rob. 289.

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was reasonably affected by it. This is the real confusion of property. The agent resorted to a false oath to protect the enemy's interests; and this being detected, it became impossible to say what was neutral and what was not. The only question then is, was the misdirection of the court upon this point of law material to the issue? And it certainly was, for this reason. The warranty of *American* property meant, not only that the goods belonged to *Americans*, but that the owners or their agent, would do no act in the course of the voyage to compromit their neutral character; that the goods should not be liable even to impediment, in consequence of unneutral conduct. *Rich v. Parker (a)*. Now by putting out of view the relation of agency which subsisted between *Stites* and the assured, his acts became unimportant; whereas it was by those unneutral acts, and by his false swearing, that the condemnation was justified, and that the warranty of neutrality was broken. In *Calbraith v. Gracie*, in the Circuit Court of the *United States*, April sessions 1805, the condemnation of the property being caused by the false oath of the supercargo, the court held that the warranty was broken, notwithstanding the property was most clearly *American*.

3. That the court were wrong in charging the jury that the risk was not increased by the conduct of *Stites*. It was beyond doubt increased for two reasons. First, because the masking of property to so great an extent, threw a suspicion over the whole cargo, which made it the more liable to be both taken in and condemned; and secondly, because the agent's persisting in a gross falsehood as to the bulk of the cargo, discredited his testimony as to the rest, and his being the perpetrator of the fraud, led to the entire condemnation. Without attending to the consequences which did occur, no one can believe that the company would have insured these goods for seven and a half per cent., if they had been told that two thirds of the cargo were enemies' property covered by the agent of the assured. If the law given in charge, had been founded upon the assumption that there was no covered property on board, the case might have been different; but in the conclusion, the court say, even if *Stites* did cover *Spanish* property, yet if the plaintiffs had no knowledge of

(a) 7 D. & E. 709.

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it, they were entitled to a verdict. For the purpose of stating the law, they therefore admit the fact of covering, and put the case upon the knowledge, which was wholly immaterial. The true question has never been submitted to the jury, and of course we are entitled to a *venire de novo*.

Ingersoll and *Lewis* for the defendants in error. The bill of exceptions is bad *in toto*, because it was tendered in consequence of the court's not charging that the evidence was a bar to the plaintiffs' recovery. The form of the bill is taken from *Buller's Nisi Prius* 317, where the defendant insisted that the evidence was decisive to give him the benefit of the 24 G. 3. c. 44. which was a bar to the action, and it was therefore a question of law; whereas in this case, where evidence was given on both sides, where the foreign sentence was not conclusive, and where the fact of agency, of enemy's property, and of covering, were questions for the jury, it was impossible for the court to charge that the evidence was a bar, or that it was decisive. The bill of exceptions ought to be taken on some point of law arising upon a fact not disputed. *Show. Par. Ca.* 120. 1 *Mod. Plead.* 104, 105. *Trials per Pais* 222, 223. If a party wishes an opinion as to the sufficiency of the evidence, he must demur; *Show. Par. Ca.* 115; he cannot draw the whole matter into controversy again upon a writ of error. But further, if the bill contains matter upon which the party excepting was not overruled, it is not to be signed; *Show. Par. Ca.* 120; and as the only point upon which the plaintiffs in error were overruled, was as to the evidence being a bar, upon which they had no right to ask an opinion, we submit that the bill of exceptions falls; at least that the question in this court must be confined to that point.

It is said that the evidence was decisive, because as there was no explanation given of the excess beyond the outfit, the warranty was falsified. This was in part matter of fact for the jury. But as matter of law the premises do not warrant the conclusion. The warranty applied only to the *goods* of the assured, not to the cargo of the vessel; and the neutrality of the former was proved. The case of *Blagge v. The New-York Insurance Company* does not apply. There the warranty extended to the whole cargo, and the excess was obtained at a hostile port. Here the warranty was confined

to particular goods, and the excess was taken in at the neutral island of *St. Thomas*. Whether the court were right in charging that the fact of enemies' property was doubtful, is of no consequence. It was merely an opinion as to a question of fact, which is not examinable here. The admiralty proceedings, which are treated as if they were conclusive upon the matter, were not even evidence of it.

The court were not wrong in the opinion which is the ground of the second objection. That opinion is to be understood in relation to the facts. The goods of the plaintiffs were clearly distinguishable from the property in the name of *Stites*; they were personally guiltless; and *Stites* was not their agent as to the property covered; and it results from all the admiralty cases, that under such circumstances, a discrimination is made between the guilty and the innocent property. *The Mercurius* recognises this principle. The cargo is not affected by breach of blockade, unless the owners are consulant of the blockade, or the captain is the agent of the cargo. In *The Eenrom* the whole property was invoiced as belonging to the same neutral owners, who had themselves directed the masking of the property; there was therefore no means of discrimination, and the owners were personally implicated. It is there said, that if a neutral will weave a web of fraud, the admiralty will not take the trouble of picking out the threads for him, in order to distinguish the sound from the unsound. This is undoubtedly the rule. But if there is no web, if the threads are not interwoven, if the sound is already distinguished upon the papers, then it follows that the rule must be to restore. *The Rosalie* and *Betty* was also a case of mixed property; for Sir *William Scott* says in page 294, "if Mr. *Kaster* has any property in this cargo, if he "has mixed his interest in any proportion with the interest "of the enemy, and resorts to modes of prevarication to "conceal the enemies' interest, such a conduct will affect his "own share." It is the obscurity and doubt produced, not by the answers of the master, but by the state of the property itself, which leads to the condemnation of the whole; no means of discrimination being furnished by the documents of the property, as was required in *The Franklin* (a).

(a) 6 Rob. 134.

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In the case of *Miller v. The Resolution* (a) the court of appeals discriminated without hesitation when means were offered. The transportation of enemies' goods is agreed to be lawful; when done fairly, the ship owner in case of capture gets full freight. *The Copenhagen* (b). The fraud consists in the concealment, and the penalty lies in the forfeiture of the concealed goods, and of those which are identified with them. *See on Captures* 141. What shews this rule decisively, is the conduct of the admiralty with respect to neutral ships in which property is masked. If the penalty extended to the whole property of the owner, whether distinguishable or not, the ship would be forfeited with the cargo; whereas the penalty in such a case is simply the loss of freight. *The Atlas* (c). *The Vrow Henrica* (d). The case of *The Rising Sun* (e) is in point to the present. Then as to the liability of the owners for their agent. Certainly it cannot be to a greater extent, than if they were personally implicated; and even then the discriminated property is not forfeited. But in no case are owners implicated at all by the agent's misconduct, except when he acts in relation to their property, or under a general authority. In *The Princessa* the very property claimed by an *Englishman*, was shipped by his agent as *Spanish*. *The Susa* was a ship claimed for the *American* owner, whose agents had impressed upon her the character of a *French* ship; and in *The Mars*, where Sir *William Scott* asserts the rule that the owner is answerable penalty to the whole amount of the property under the agent's care, the whole property was in fact claimed by the *American* owner, and the fraud was in relation to the whole. In *Grousillat v. Ball* the master was the general agent of the whole cargo, and covered the enemies' property in his owner's name. *Stiter* was not the agent of the plaintiffs as to the covered property, nor did he in fact act as their agent. He was joint supercargo with *Thomas*, who knew nothing of *Stiter's* property. The two made one agent; neither could bind the principal without the assent of the other. His acts alone could not therefore condemn his owner's property. Nor did his con-

(a) 2 *Dall.* 14.

(b) 2 *Rob.* 245.

(c) 3 *Rob.* 245. note a.

(d) 4 *Rob.* 282.

(e) 2 *Rep.* 87.

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duct at *Tortola* lead to the condemnation. False papers, prevarication, spoliation, are not a ground of condemnation, but merely causes of suspicion, grounds for further proof, or of refusing costs upon acquittal. *The Rising Sun* (a). 2 *Brown Civ. and Adm.* 450. *Lee on Cap.* 238, 240. The fact is that the cargo and ship, the latter of which was clear *American* property and never would have been condemned on account of the covered goods, were both condemned for another cause; and that was her sailing from an enemy's colony to a port not in her own country, contrary to the spirit of the order of 24th *June* 1803. It follows therefore from the whole, that nothing was done by the agent of the assured to compromit the neutrality of the goods insured, that the warranty was performed, and that the opinion of the court was right.

As to the increase of the risk, it was a matter of fact for the jury, and the court were not asked to charge upon that point. But the risk was not increased; not the risk of being taken in, because the underwriters must have known that the vessel would be taken in if met on this voyage; nor the risk of being condemned, because condemnation followed from the voyage; and if it did not, it could not result, as has before been shewn, from covering property as *Stites* is said to have covered it. At all events the plaintiffs' agent did not increase the risk as agent, but as captain. In *Calbraith v. Gracie*, it was the supercargo whose acts condemned the property.

The errors in the conclusion of the charge, if any, were in favour of the defendants; because the jury were told that if the assured knew of the covering, they were not entitled to a verdict; whereas their knowledge of the fact ought not to be followed by any such result; they ought at least to have been parties to it.

In reply to the argument against the bill of exceptions, it was said that there were two questions. 1. Whether on the face of the bill a writ of error would lie. 2. Whether there was sufficient on the record to reverse the judgment. As to the *first*, a bill of exceptions lies to the whole charge, because it lies to each part separately. The word *decisive* does not

(a) 2 *Rob.* 89.

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mean conclusive; but that the evidence was such as entitled us to a decision in our favour, and so the judge was asked to charge. If he had said that the evidence had weight, and so referred it to the jury, no exception could have been taken; but instead of that, the opinion of the court was given upon points of law, all of which we say are erroneous, when applied to the facts, and we have excepted to all. If the bill was too broadly taken, it should have been corrected below; it is now too late. As to the *second* question, that rests upon the argument already made.

TILGHMAN C. J. delivered the court's opinion.

This cause was brought before us, by a writ of error to the Court of Common Pleas, founded on a bill of exceptions which states all the evidence, and contains the charge of the court at large. It was an action on a policy of insurance on goods shipped by *Pratt* and *Clarkson* on board the ship *Charles*, on a voyage from the *Havanna* to the *Danish* island of *St. Thomas* in the year 1805, when *Denmark* was a neutral power. The ship was owned by *Pratt* and *Clarkson*; and the captain and *Isaac Thomas* were joint agents of the plaintiffs, and supercargoes. The policy contained a warranty that the goods were *American* property, to be so proved here only, and it was fully proved that the goods were the property of the plaintiffs, who are *Americans*. Some evidence was given to prove, that captain *Stites* had taken in three hundred and fifty boxes of sugar, and twenty-seven bales of beeswax, which in truth were *Spanish* property, and carried them under false papers as his own property; but they were not blended with the goods of the plaintiffs. The invoice and other papers respecting them, were distinct from those of the plaintiffs. After the evidence was closed, the counsel for the defendants insisted that the several matters given in evidence, ought to be allowed as *decisive evidence* to entitle the defendants to a verdict. I think it would have been more proper, and would have brought the questions of law more to a point, if the counsel had proposed the particular matters on which they desired the opinion of the court to be given. Indeed it would have been impossible to give in charge to the jury, that the evidence was *decisive* on either side, without assuming the decision of facts, which is beyond

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the power of the court. The judge viewing it in this light, did not say whether it was decisive or not, but summed up the evidence, and then gave his opinion on certain points of law, arising as he conceived out of the facts. The jury found for the plaintiffs; and the defendants' counsel excepted to the court's opinion, in general.

It has been made a question how this bill of exceptions is to be understood, and what points are now open for discussion. If the president of the Court of Common Pleas had declared to the jury that the evidence was not *decisive* in favour of the defendants, I do not know that any objection could have been made to it. The evidence was legal, but how far decisive, the jury were to judge. It has been determined by this court in the case of *Burd v. The Lessee of Dansdale (a)* that if a judge gives an opinion upon facts, not warranted by the evidence, it is no error which can be assigned on a bill of exceptions. Neither do we conceive that advantage can be taken of an erroneous opinion on a point of law, immaterial to the issue which the jury are trying. But it is open to the plaintiff in error, to assign error in an opinion on any matter material to the issue, appearing on the bill of exceptions, although it is not particularized in stating the exceptions.

The judge's charge appears to be in substance, this, that the conduct of captain *Stites* in covering *Spanish* property (if he did cover it) without the knowledge of the plaintiffs, could not affect the goods of the plaintiffs, which were not blended with the covered goods; and therefore if the jury should be of opinion that the captain had on board *Spanish* property, and the plaintiffs *participated* in the act, their verdict should be given for the defendants; but if they should be of opinion that the plaintiffs had no *knowledge* of it, their verdict should be for the plaintiffs.

It is contended on the part of the defendants, that the plaintiffs are answerable for the conduct of their captain and agent, and his conduct has been such as to break the warranty of *American* property, or at any rate to increase the risk of the voyage, so that the plaintiffs ought not to recover. It is not unlawful for a neutral to carry the goods of a belligerent. So far from it, that it is the constant practice

(a) *Ante* 30.

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of courts of admiralty to restore the ship with full freight to the neutral owner, unless the case is attended with particular circumstances. It was not the carrying of *Spanish* goods then, but the attempt to mask them under a neutral cover, that was a breach of neutrality. This attempt was the act of the captain, or perhaps of the captain and his colleague Mr. Thomas. It is therefore to be considered how far the act of one, or both of these persons, may be imputed to the plaintiffs. There are some principles about which there is no dispute. The captain is the agent of the owners with respect to the ship, and they must answer for his conduct. But he is not agent for the owners of the goods, unless so specially constituted. If he attempts to enter a port, in breach of a blockade, the ship is subject to condemnation, and so also is the cargo, although not committed to the care of the captain, if it belong to the owners of the ship. An agent for the owner of the goods, may likewise affect his principal, by his acts respecting the goods committed to his charge. If he violates the law of nations with respect to those goods, they may be condemned. So if he mixes or entangles them with goods which are contraband, or the property of an enemy, they must all share the same fate. This is the principle laid down by Sir William Scott in the case of the *Rosalie* and *Betty*, 2 Rob. 294. The same judge has decided that owners of the cargo, are affected by the conduct of their general agent or supercargo, not only civilly, but penally, to the amount of their property on board; *The Mars*, 6 Rob. 87; and this doctrine was adopted by this court in *Crousillat v. Ball*, of which my brother Yeates has a manuscript note, fuller than the report by Mr. Dallas. Taking the law to be so, the charge of the Court of Common Pleas seems to have drawn the attention of the jury to the wrong point; or at least to have laid them under too great restriction. The point submitted to their consideration, was, whether the captain covered *Spanish* property with the knowledge, or participation of the plaintiffs. The consequences resulting from improper conduct in a supercargo, or general agent, were thrown out of the question. Now suppose the jury had thought, that the captain, with the acquiescence of his colleague Mr. Thomas, had attempted to cover *Spanish* property without the knowledge of the plaintiffs; in that case the ver-

dict ought to have been for the defendants; and yet the jury under the charge of the court were bound to find for the plaintiffs. The Court of Common Pleas have laid down the law, that the goods of the plaintiffs could not be affected by any conduct of their agent, because they were not blended with the covered goods. In this we think they were wrong. The jury should have been told, that the whole property of the plaintiffs on board the ship, was liable to condemnation by the law of nations, if their general agents attempted to deceive one of the belligerent powers by covering the property of his enemy. We are therefore of opinion, that in this respect the charge was erroneous, and consequently the judgment must be reversed, and a *venire facias de novo* be awarded.

Judgment reversed, and
Venire de novo.

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SCHEE *against* HASSINGER.

IN ERROR.

Philadelphia,
Thursday,
January 11.

UPON a writ of error to the Common Pleas of Philadelphia county, the case was as follows:

Where goods were delivered to a factor to sell and remit, and he sold a part payable in coffee, and afterwards remitted sugars on account, but gave no further statement either of sales or receipts, the jury were at liberty to presume that the amount sales had come to his hands in money, and therefore the principal

Hassinger the plaintiff below, brought the present action to March term 1807, against *Schee* the plaintiff in error, and a certain *William French*, as to whom the sheriff returned *non est inventus*. The declaration contained five counts. The 1st, was upon a promise, in consideration that the plaintiff, at the request of *Schee* and *French*, had delivered to them certain goods to be sold, and of a reasonable reward for the sale, to sell and dispose of them and to render a reasonable account upon request. The 2d, was upon a promise, in consideration of the delivery of certain goods to be sold, to render a reasonable account upon request. The 3d, was upon a

might recover it upon a count for money had and received.

2d. Whether, when goods are delivered to an agent to sell and remit, the law raises a promise by implication to account, so that an action on the case will lie for not rendering an account, although no express promise was made?

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HASSINGER. Plea, the general issue.

By the bill of exceptions upon which the cause came before this court, it appeared that the plaintiff gave in evidence upon the trial, a bill of lading of sixty-four barrels of pork, shipped by him on board the brig *Hynam*, *Graisbury*, for *Carthagena* and a market, deliverable to *Schée* and *French*, on account and risk of the shipper; the manifest of the brig, dated the 29th of *November* 1804, containing the sixty-four barrels of pork; and an account sales of thirty barrels of the pork, dated at *Cape François* the 1st of *January* 1806, and signed by *French*, in which he stated so much to have been sold on the plaintiff's account to the government, the net proceeds being 514 dollars 65 cents, *payable in coffee*. He then produced as a witness the master of the *Hynam*, who deposed that fifty barrels of the pork were landed at *Cape François* in the presence of *Schée*, who with *French* attended to the landing, and passed the same through the customhouse; that *Schée* soon after left the *Cape*, and went to the south side of the island, when *French* took the direction and management of the pork upon himself; that the bill of lading above mentioned was delivered to both *Schée* and *French*, who went in the brig to *Cape François*; and that the brig sailed from *Cape François* with the remaining fourteen barrels of pork, which were captured by a *French* privateer and totally lost. The plaintiff also gave in evidence an invoice of two hogsheads and eight barrels of *sugar*, amounting to 300 dollars 63 cents, signed by *French* at *Cape François* the 12th of *March* 1806, and shipped by him on board the *Aurora* for account and risk of the plaintiff; and lastly he exhibited his account against *Schée* and *French*, stating a balance due from them on account of the pork, of 532 dollars 37 cents.

After the evidence had been received and heard by the jury, the counsel for the defendant urged to the court, that an action on the case would not lie, under the facts and circumstances in evidence, because there was no express promise to account; and requested the court to charge the jury accordingly. But the court gave it in charge to the jury that the action did lie, and sealed a bill of exceptions. The jury found a verdict for the entire balance.

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Levy for the plaintiff in error, argued that upon the evidence the action could not be maintained, and that *account render* was the only remedy. It is certainly the most appropriate action, where goods have been delivered to a bailiff, as in this case, to make the best benefit for the owner, and where the whole account stands open, so that it is impossible for a jury to settle it. It is also the most beneficial to the plaintiff, because in that form he is entitled to recover both what the bailiff has made, and what he might reasonably have made. *Co. Litt.* 172 a. But be this as it may, the want of an express promise is a decisive reason against the present action. The case of *Wilkyns v. Wilkyns* (a) is in point. The declaration was in *assumpsit* against the master of a ship, upon a promise, in consideration that the plaintiff at his request had delivered to him certain goods, to dispose of the goods, and to render an account upon his return from his voyage. The defendant pleaded in abatement, that he was the plaintiff's bailiff of the said goods, and to render an account of the profits; and therefore the plaintiff should have brought account, and not case. Upon a demurrer to this plea, three judges were of opinion that the action would lie, because it was brought upon an *express* promise, and not upon a *promise by implication*. But *Holt* doubted even of this, and told the plaintiff that he would not permit him to give the account in evidence, but that he should direct his proof only as to the damages for not accounting; for he would not travel into an account in such actions. Here is the strongest possible implication that an *express* promise is necessary, and the doubt of Lord *Holt* whether even that will answer. In the same case reported by *Salkeld*, 1 *Salk.* 9, the action is supported upon the same ground, an express promise. So in 1 *Show.* 71. The right of the principal to elect any other action than account render against his bailiff, is in all the cases upon the subject made to depend upon a covenant or express promise to account; as in *Hawkins v. Parke* (b). *Roll. Abr.* 16. 1 *Bac. Abr.* 37. And a very sufficient reason for it is, that the law will not imply a promise to account, for the purpose of making the bailiff answer in a form of action, in which he may be held to bail, and can have no allow-

(a) *Carth.* 89.(b) 1 *Roll. Rep.* 52.

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ance for charges and bad debts. The impropriety of the action could not appear more clearly than in this case, where no evidence was given that the whole pork was sold, or that the defendant had received any thing but the amount remitted in sugars; and yet the object was to recover the full value of the pork. If a man receive money to expend for a particular purpose, and he lays out part, *indebitatus assumpsit* does not lie, but only account render. *Hartup v. Wardlow (a)*. So by analogy *assumpsit* does not lie, where he has sold only a part; it is matter of account for auditors, and not for a jury.

Hare and Condy for the defendant in error, answered that as the objection was merely technical, and against the justice of the case, it ought not to be favoured. Account render is a very proper remedy between partners, where neither party is entitled exclusively to the partnership fund; but embarrassing as that form of action is, it ought not to be required, where the whole fund belongs exclusively to the plaintiff, and the court can compel the defendant to do justice in a simpler form. The old objections that the defendant cannot have allowance, and may be held to bail, have at this time no weight. The court will instruct the jury to make allowance in damages, and bail may be demanded in account render after the first judgment. The objection upon the ground of principle is equally unsound. There is a legal obligation in every factor to account; and the consequence of it is, what the law uniformly infers in such a case, a promise to perform the duty. It is the foundation of the action of account render; and surely before the statute of *Anne* which gave account to executors, they might upon the implied promise have maintained case against the bailiff. In *Wilkins v. Wilkins*, as reported by *Shower*, *Holt* puts his objection to the action, solely upon the inconvenience of giving a long account in evidence to the jury; but he agreed with the rest of the court that the action lay, and he said *there was no case where a man acted as bailiff, but he promised to render an account*. The same words are repeated by *Salkeld*, so that probably *Carthew's* report is not correct. What difference is there between a promise implied by law, and an express promise?

None certainly as to their supporting an action. If no promise is implied, that is fatal; but as *Holt* explicitly asserts a promise to account in all cases, and the law asserts the same thing, that difficulty is out of the way. It is of no consequence at present what the plaintiff can recover, whether his whole demand, or damages for not accounting; it is enough under the bill of exceptions if the action lies for any purpose. The case of *Poulter v. Cornwall* (a) is express, that an action on the case lies where a bailiff has refused to account; and the jury were entitled to presume a refusal from the delay. There is however another reason why the action lies. The question under the defendant's exception is, whether it will lie upon either of the counts; and the exception is the same as a demurrer to the evidence; it means that no conclusion which the jury could draw from the whole evidence, would support either count. Now there was evidence enough to support the count for money had and received. If goods are delivered to a man to be sold, and he says nothing about them for a long time, the jury may presume that he has sold them and received the money. *Longchamp v. Kenny* (b) is in point. The fixed price at which the ticket was to be sold in that case, is the same as the account sales of the thirty barrels in this. It was therefore wholly a question of evidence, whether the defendant had received the money; and from his delay and silence the jury might presume he had.

Levy in reply. It is not possible for the jury to presume the receipt of money by the defendant. What may be inferred from written documents is a question of law; and all the evidence, except as to the mere delivery of the goods, was in writing. In fact, the evidence negated the receipt of money. The sales to the government at *Cape François* were payable in coffee, which not only implied a payment thereafter, but a payment in goods. The difference between this and *Longchamp v. Kenny* is, that here the defendant shews what he did with the pork; and there the defendant refused to give any account of the masquerade ticket. But that case stands by itself. Lord *Mansfield* had great doubts whether the action would lie at all; but from his great par-

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(a) 1 *Salk.* 9.(b) *Dough.* 137.

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tiality to the action for money had and received, and particularly from this circumstance, that the defendant came prepared to resist the demand for the ticket, he at length maintained it. The other judges supported the action upon another count. If the count for money had and received could be supported by so forced a presumption as is contended for in this case, it would be a complete surprise on the defendant.

TILGHMAN C. J. delivered judgment.

After the evidence in this cause had been closed, the defendant's counsel requested the Court of Common Pleas to give their opinion, that "under the facts and circumstances of the case, an action on the case would not lie." I take it that by asking the courts' opinion in this manner, the defendant intended to give the plaintiff all the advantage of a demurrer to the evidence. He could not have meant to take the opinion of the court upon matters of fact; because it was not the office of the court to give such opinion; nor if they had given an erroneous opinion, could there have been any redress by writ of error. What we have to consider then, is whether there was any evidence from which the jury might draw an inference to support the action. Two points arise out of the evidence. 1st, Whether when goods are delivered to an agent to sell and remit the proceeds to his principal, the law raises a promise to *account* by implication, so that an action on the case will lie for not rendering an account, although no express promise was made. 2d, Whether there was any thing in the evidence, from which the jury might infer that money had come to the hands of the defendant from the sale of the plaintiff's goods.

On the 1st point, the plaintiff's counsel cited the case of *Wilkyne v. Wilkyne*, reported by *Carthew*, *Salkeld* and *Show-er*. As the reports do not exactly agree in what was said by the judges, I consider this case as no further an authority than on the point adjudged, which was, that an action on the case would lie against a bailiff on his *express* promise to *account*. No authority on either side has been cited directly in point, nor shall I give an opinion on this question. It is unnecessary, because I am satisfied that the judgment should be affirmed on the second point in this cause.

It appears from the bill of exceptions, that sixty-four barrels of pork, the property of the plaintiff, were by him deli-

vered to the defendant and one *French*, (who was included in the original writ as one of the defendants, and as to whom the sheriff returned *non est inventus*) to be sold on account of the plaintiff. Thirty barrels of this pork were sold to the government at *Cape François*, the net proceeds whereof were 514 dollars 65 cents payable in coffee, as appears by the account of sales; but it is not said when payable. The account sales is dated 1st *January* 1806, and in *March* 1806, the defendant shipped from the *Cape* to the plaintiff in *Philadelphia*, two hogsheads and eight barrels of sugar, amounting by the invoice to 300 dollars 63 cents. I will not say whether if I had been on the jury, I should have thought myself warranted in finding that money had come to the hands of the defendant, for the use of the plaintiff. But it is certain that the matter given in evidence was worthy of their consideration, as applied to the count for money had and received. Although the account of sales shewed that the pork was sold for coffee, and not for money, yet the remittance of sugar proved that a payment had been made to the defendant, which had enabled him to procure the sugar. It might have been expected too that he should have shewn at what time the coffee was payable, and why payment had not been made, and what had become of the rest of the pork. There was proof that some of it had been lost, but the rest was unaccounted for. These things, I say, were worthy of the jury's consideration; and if so, we cannot say what inference they might have drawn. In *Longchamp v. Kenny*, (*Doug.* 132) the plaintiff recovered on a count for money had and received, although there was no evidence that the defendant had received any money, but only that a masquerade ticket, the property of the plaintiff, had come to his hands, which he had not returned, nor given any account of. We have considered the principle of this case as law in *Pennsylvania*, and therefore there is no necessity of positive proof that money came to the hands of the defendant. Upon the whole, the record shews, that there was evidence applicable to one count of the declaration. Of this evidence the jury were judges. If they found against the weight of evidence, the defendant's remedy was by motion for a new trial. I see no error on the record, and am therefore of opinion that the judgment be affirmed.

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Judgment affirmed.

1810.

Philadelphia,
Wednesday,
March 21.

The Commonwealth against SEARLE.

The publishing of a forged note of hand, or any other writing of private nature, though not under seal, as a genuine note or writing, with intent to defraud, is indictable at common law.

THE defendant was indicted at an *Oyer and Terminer holden by the judges of the Supreme Court after the December term, for forging, and for uttering and publishing as true, a counterfeit ten dollar note of the Bank of North America.

The indictment contained two counts. The 1st was for forging, and procuring to be forged, the note in question. The 2d charged that "the said John Searle on the same

day and year aforesaid at the county aforesaid, with force and arms, having in his custody and possession a certain other false forged and counterfeited paper writing, partly written and partly printed, purporting to be a true and genuine promissory note for the payment of money, called a bank note of the Bank of North America, and purporting to be signed by J. Nixon president, and also by the cashier of the said bank, the tenor of which said last mentioned false forged and counterfeited paper writing, partly written and partly printed, purporting to be a true and genuine promissory note for the payment of money, called a bank note of the Bank of North America, is as follows, that is to say

Where a statute creates, or expressly prohibits an offence, and inflicts a punishment, the statute punishment cannot be inflicted unless the indictment concludes *contra formam statuti*. Otherwise, where the statute only inflicts a punishment on that which was an offence before,

In an indictment for forging a bank note, it is not necessary to set forth the ornamental parts of the bill, as the devices, mottos, &c.

X I promise to pay to D. Catwell or bearer on demand ten dollars. Philadelphia 26 of February 1808 n 2467 c 614. For the President Directors and Company of the Bank of North America.

Q H. Drinker j Cash. J. Nixon Pres^t. X

"falsely illegally knowingly fraudulently and deceitfully did utter and publish as a true and genuine promissory note for the payment of money, called a bank note of the Bank of North America, the said last mentioned false forged and counterfeited paper writing, partly written and partly printed

* The importance of this case it is presumed will justify the reporter in inserting it in this place, although it is not in strictness a decision in the Supreme Court.

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ed, purporting to be a true and genuine promissory note "for the payment of money, called a bank note of the Bank of North America, he the said *John Searle*, at the time of uttering and publishing the same, then and there well knowing the same to be false forged and counterfeited, with intent to defraud *Joseph Simmons*, to the evil example of others in like case offending, and against the peace and dignity of the commonwealth of Pennsylvania."

The defendant was found not guilty upon the first, and guilty upon the second count; and his counsel moved in arrest of judgment for the following reasons:

1. Because the uttering a note of the Bank of North America knowing the same to be counterfeit, is not indictable at common law, but is an offence created by act of assembly, and therefore the indictment should have concluded "against the form of the act of assembly." Or if it is an offence at common law, still, as it is punishable only by act of assembly, no punishment can be inflicted, because the indictment does not conclude against the form of the act &c.

2. Because the note as described in the indictment differs from the note proved to be uttered, as the words "ten" and "*cavendo tutus*,"* which were in the note proved to be uttered, are not mentioned in the description of the note laid in the indictment.

3. Because the indictment states that the note purported to be signed by the cashier, without naming him, and the note produced is signed by *H. Drinker* j Cash.

Phillips for the defendant. 1. Publishing a counterfeit note is no offence at common law. It was a long time questionable, whether even the forgery of a private unsealed instrument was indictable at common law except as a cheat; but although that point may have been settled, the uttering of such a forgery stands upon a different ground; the former being distinct from every other offence, and consisting in the fabrication of the instrument, the latter being merely an attempt at cheating, by a false token. The statute of 2 *Geo.* 2. ch. 25. was the first that punished the uttering of a forged

* The words "*cavendo tutus*," were the motto to an ornamental device on the bill, in the centre of which was the word "ten."

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note as a felony; and it recited in the preamble that it was found necessary to remedy the defects in the existing law. So, the common law not being adequate to the mischief, the legislature by an act of the 18th *March* 1782, made the uttering forged notes of the Bank of North America a felony. This act was repealed on the 13th *September* 1785, when the incorporation of that bank was overthrown; and when by the law of 17th *March* 1787, 2 *St. Laws* 499, the corporation was revived, nothing was said as to the revival of the provision against forging and uttering forged notes of that bank, and of course it was at an end. The first act for the reform of the penal code, passed the 5th *April* 1790, 2 *St. Laws* 801, contains no punishment for this offence; but in the act of 22d *April* 1794, 3 *St. Laws* 600, it is declared that if any person shall be concerned in printing, signing, or *passing* a counterfeit note of this bank, he shall be punished by fine and imprisonment at hard labour. It is this act which creates the offence for which the defendant is indicted; and therefore the indictment is bad, as it does not conclude *contra formam statuti*. If an offence be newly enacted or made an offence of a higher nature, the indictment must conclude *contra formam statuti*. 2 *Hale's H. P. C.* 189. But if this is an offence at common law indictable in this form, no punishment can be inflicted; not the common law punishment, because where there is a punishment by act of assembly, the common law punishment is taken away by the act of 21st *March* 1806, 7 *St. Laws* 569; nor the punishment by act of assembly, because not concluding *contra formam statuti*, it stands as an indictment at common law, and can only receive the penalty that the common law inflicts. 2 *Hale's H. P. C.* 191. The precedents conclude against the form of the statute. 2 *East Cr. Law* 874.

2 and 3. The variance between the note laid and the note proved is fatal. The utmost strictness is required in setting out the tenor. The words "purporting to be a bank note," imply that the paper on its face has the appearance of a bank note; *The King v. Jones* (a); and the instrument charged to be forged, must be set out. *The King v. Lyon* (b). The instrument here charged to be forged, omits certain words

(a) 1 *Leach* 243.

(b) 2 *Leach* 681.

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and devices contained in the genuine bill, so that it does not purport as is alleged, and it is not completely set out. A variance in the name, as *King* instead of *Ring*, defeats the indictment. *The King v. Reading* (a). So an indictment for forging a note purporting to be signed by *Christopher Olier*, is not supported by a note with the signature of *C. Olier*. *The King v. Reeves* (b). *The King v. Lee* (c).

Gibson and *Lewis* for the commonwealth. The 2d and 3d exceptions have no effect on a motion in arrest of judgment; they would have been urged with more propriety as objections to evidence, or upon a motion for a new trial. The 2d however is founded upon the mistake that the ornamental devices upon the bill are parts which it is material to set out. Every part of the bill that was evidence of contract, is set out in words and figures, and that is all that is requisite. *Commonwealth v. Bailey* (d), *Commonwealth v. Stevens* (e). The 3d is also a mistake. The purport of an instrument is its meaning, on its face; certainly the counterfeit note purported to be signed by the cashier. When the tenor of the bill is set out, then the signature is given.

[The court here intimated their opinion, that none of the exceptions, save the first, were applicable to a motion in arrest of judgment, but to a motion for a new trial, upon the ground of the verdict's being against evidence. At the same time, they expressed their concurrence with both the cases from the *Massachusetts Reports*, and that it was not necessary to set forth the ornamental parts of the bill, the devices or mottos.]

The 1st exception alone is proper in arrest of judgment; but it is founded upon a false position, that the publishing of the note was not indictable at common law. Forging a receipt for goods which the defendant is bound to deliver, is indictable at common law. *The King v. Ward* (f). This case decides that the forgery of any writing by which a person might be prejudiced, although in fact no one was prej-

(a) 2 Leach 672.

(b) 2 Leach 933.

(c) 1 Leach 404.

(d) 1 Mass. Rep. 62.

(e) 1 Mass. Rep. 203.

(f) 2 Stra. 747. 2 Ld. Ray. 1461. S. C.

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dicted, was indictable at common law as a forgery; and the publication of the forgery with intent to defraud, though in fact no person was defrauded, stands upon the same principle: 2 *East's Cr. L.* 972. s. 51. There is not an act of assembly in force, in which this is made an offence at all, or where it is made an offence of a higher nature than it was at common law, or where it is prohibited; the punishment alone is prescribed, and that is lighter than it was at common law. The 4th section of the act of 5th *April* 1790, enacts that every person convicted of any offence not capital, for which by the laws in force before the act of 15th *September* 1786, burning in the hand, cutting off the ears, nailing the ear to the pillory, placing in and upon the pillory, whipping or imprisonment for life, was or might be inflicted, shall instead of that punishment, be fined and imprisoned at hard labour for any term not exceeding two years. It is under this act that publication of a forgery is punishable. The questions are therefore only whether the indictment, under these circumstances, should have concluded against the form of the act. If a statute creates an offence, or if a misdemeanor at common law is converted by statute into a felony, there the indictment must conclude *contra formam statuti*; and if a statute contains a prohibition of a matter which was an offence at common law, and inflicts a punishment, judgment for that punishment cannot be given unless the indictment concludes against the statute. But where the offence is at common law, and the statute merely inflicts a punishment, there it is not necessary that the indictment should so conclude. The statute punishment may be inflicted without it. 2 *Hale* 189, 190, 191. *The King v. Smith* (a). The act of 22d *April* 1794, does not apply to this case, because it is the passing of the note, and not the publication, that is, the obtaining some person to take it in payment, and not the offering it in payment, which is punished by the 35th section of that act; but if it were punishable under that section, it might still under the above authorities be so punished on this indictment. The precedents in this state are with us. In *The Commonwealth v. Archer* in the Mayor's Court, November 1806, and in *The Commonwealth v. Lewis* in the Quarter Sessions, November 1808, the defendant

(a) *Doug.* 441.

was punished under the act of 1790 for forging bank notes, although the indictment did not in either case conclude against the form of the act.

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TILGHMAN C. J. delivered the opinion of the court.

The defendant has been indicted and found guilty, of *uttering* and *publishing* as true and genuine, a forged note of the Bank of North America, knowing the same to be forged, with intent to defraud *Joseph Simmons*. A motion has been made in arrest of judgment, because the indictment does not conclude "against the form of the act of assembly &c." His counsel contend, that the offence charged in the indictment, is not indictable at common law; and that even if it was, no judgment inflicting the common law punishment can be given, because by the act of 21st March 1806, in cases where punishment is prescribed by act of assembly, no punishment shall be inflicted agreeably to the provisions of the common law. It is said, that for the offence charged in the indictment, there is a punishment provided by act of assembly; yet that punishment cannot be inflicted, because the indictment makes no mention of the act of assembly. Hence it is inferred that no judgment can be given on the indictment. It will be necessary therefore to consider, 1st, Whether the offence is indictable at common law. 2d, Whether it is punishable by any act of assembly. And 3d, Whether judgment for the punishment prescribed by act of assembly, can be rendered on this indictment.

1. It seems to have been the opinion of the old writers on criminal law, that forgery at common law could not be committed with respect to any writing of a *private* nature, unless the same was under *seal*. But this point was fully investigated, and decided to the contrary, in the case of *The King v. Ward* (2 *Ld. Ray.* 1461: 13 *Geo.* 1.); since which the law has been considered as settled. In that case, the indictment contained two counts; the 1st, for forging an unsealed writing, with intent to defraud the Duke of *Buckingham*, and the 2d, for *publishing* the same writing with the same intent. The court did not decide on the second count, because there was no occasion; but I can see no reason, why the publication should not be indictable, as well as the forgery: every

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mischief that might be produced by one, might also be produced by the other. One point decided by the court was, that it was immaterial whether the Duke of *Buckingham* was actually injured by the forgery or not. In giving their opinion they say, it may be inferred from the statute *5 Eliz. chap. 14.* that the forgery of writings without seal, was an offence at *common law*, because the preamble of the statute recites, that the wicked practice of making, *forging*, and *publishing*, deeds, writings, &c. hath increased, chiefly because the punishments limited by the laws and statutes were too mild. Now this argument has as much weight to prove that the publication was punishable, as that the forgery itself was, because both are mentioned. But what I chiefly rely on is, that the *publication* is in its nature as dangerous to society as the forgery, and therefore there is no good reason, why the common law should punish one, and not the other. There have been so many statutes in *England* inflicting severe punishments on forgery, and the uttering and publishing of forged writings, within the last century, that we are not to expect many precedents of indictments at *common law* in that country. But no authority, or even *dictum* has been produced, to shew that publication was not an offence. We may safely conclude therefore, from the reason of the thing, that it is.

2, We have no act of assembly expressly prohibiting the forging, or uttering of forged notes of the Bank of North America. But the act of 22d *April* 1794, sect. 5, enacts, that every person who shall be convicted of having falsely uttered, paid, or tendered in payment, any counterfeit or forged gold or silver coin, knowing the same to be forged or counterfeit, or shall be concerned in *printing, forging*, or *passing* any counterfeit notes of the Banks of *Pennsylvania, North America*, or the *United States*, knowing them to be such, or altering any genuine notes of any of the said banks, shall be sentenced to a confinement in the gaol and penitentiary house, for any term not less than four, nor more than fifteen years &c. The offence laid in the indictment does not come within this act, for the plaintiff is not charged with *passing*, but only uttering and publishing, which is a different thing. The different expressions in this act, with respect to gold and silver coin, and bank notes, shew that the legislature

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intended a difference; and there is really a difference in the nature of the things. To *utter* and *publish* is to declare or assert directly or indirectly, by words or actions, that a note is *good*. To offer it in payment would be an uttering or publishing; but it is not *passed*, until it is received by the person to whom it is offered. It is unnecessary to decide whether it would be *passed*, if the person to whom it is offered, receives it for the purpose of having it examined. The indictment only charges the uttering and publishing it as true and genuine. But there is another act of assembly, passed the 5th of *April* 1790, which provides for the offence set forth in this indictment. By the 4th section of that act, persons convicted of any offence not capital, for which by the laws in force before the 15th *September* 1786, burning in the hand, cutting off the ears, nailing the ears to the pillory, setting in the pillory, whipping, or imprisonment for life was inflicted, shall instead of such punishment, be fined and sentenced to undergo a confinement at hard labour &c. for any term not exceeding two years at the discretion of the court. And by the act of the 4th of *April* 1807, this time is increased to any term not exceeding seven years at the discretion of the court. There is no doubt but this offence might have been punished by *setting in the pillory*. It is therefore within the act.

3. It remains to be considered, whether under this indictment we can give judgment for the punishment prescribed by the act of assembly. I take the law to be, that where a statute *creates* or expressly *prohibits* an offence, and inflicts a punishment, the indictment must conclude against the form of the statute. But where a statute only inflicts a punishment on that which was *an offence before*, there is no necessity of mentioning the statute. When an indictment charges a person with having done a thing against the form of the statute &c., the obvious meaning is that the offence was committed against the form of the statute, without any reference to the punishment. This seems to be Lord *Hale's* idea, who says, "if an offence be *at common law* and also "*prohibited* by statute, with a corporal or other penalty, yet "it seems, the party may be indicted at common law; "and then though it concludes not *contra formam statuti*, it "stands as an indictment at common law, and can receive

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"only the penalty that the common law inflicts in that case."
2 Hale 191. The expressions of *Hawkins* are more general, and less accurate. He says, "it seems to be taken as a common ground, that a judgment by statute shall never be given on an indictment at common law, as every indictment which doth not conclude *contra formam statuti* shall be taken to be." I presume his meaning was the same as *Hale's*; but if his opinion was, that judgment for the punishment prescribed by statute, could in no case be given on an indictment not concluding *contra formam statuti*, he was mistaken, as may be proved by the highest authority. By the statute 25 Geo. 3. c. 37, the judgment in murder is altered; the day of the execution is mentioned, and the body of the criminal is ordered to be dissected and anatomized; yet the indictments since that statute do not conclude *contra formam statuti*. This may be seen in the precedent of an indictment and judgment for murder in the appendix to 4th *Blackstone's Commentaries*; also in the trial of the Earl of *Ferrars* convicted and executed for murder, *State Trials* in the year 1760; and in many other cases. It may be proper to mention an instance establishing the same principle in *England*, though not an authority here, because it is since our revolution. By stat. 30 Geo. 3. ch. 48, the judgments against women convicted of treason or petty treason are altered; yet the indictments continue to be drawn at *common law*. I do not know that the point has ever before been brought before the courts of this state for decision; but the precedents as far as they have been searched, are to be found in both ways. I make no doubt but in a vast many cases, judgments under acts of assembly have been given on indictments at common law.

Upon the fullest deliberation, the court are satisfied, that the judgment ought not to be arrested.

Motion overruled.

The defendant was afterwards sentenced to three years' imprisonment at hard labour.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

Eastern District, March Term, 1810.

KIRK *against* DEAN.

IN ERROR.

*Philadelphia,
Monday,
March 26.*

THIS was an action of dower, brought by the defendant in error in the Common Pleas of *Montgomery* county, where the following case, which was agreed to be considered as a special verdict, was stated for the opinion of the court.

A conveyance of the husband's land by husband and wife, without an acknowledgment by the wife agreeably to the act of 24th February 1770, does not impair the wife's right of dower.

William Dean was seized in fee of the premises in question in his own right, in his life time, and during his coverture with the demandant. The said *William* and the demandant, by deed dated the 27th day of *December 1777*, conveyed the premises to *John Tomkins*, from whom the same, by several mesne conveyances, came to the defendant; but the demandant never acknowledged the deed. The said *William* died, leaving the demandant to survive him, who is still in full life. The said *William* did not die seised. If the opinion of the court upon the above facts shall be in favour of the demandant, judgment to be entered for her; if in favour of the defendant, then judgment to be entered for the defendant.

The opinion of the court below being in favour of the demandant, judgment was accordingly rendered for her, and the case was removed to this court by writ of error.

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Hemphill for the plaintiff in error. The question turns upon the existence of a general custom, recognised both by this court and the legislature of *Pennsylvania*, for married women to convey their dower by a deed executed before witnesses, and without acknowledgment. Such a custom was recognised by this court in 1768, in the case of *Lloyd v. Taylor* (a), where it was found to be the constant usage for femes covert to convey their estates without acknowledgment or separate examination. This went much farther than the preceding case of *Davey v. Turner* (b), where the privy examination of the wife was held, by virtue of the custom, to have supplanted conveyances by fine. It ascertained the existence of a general usage to convey by such a deed as this case presents, even the fee-simple of the wife; *à fortiori* her contingent right to dower. A general custom thus confirmed, cannot require to be ascertained a second time as a fact. It must be considered as still existing, unless some written law of the land has abolished it. The only law which can in any way affect the case, is the act of 24th February 1770, 1 *St. Laws* 535; but that does not destroy the usage as it respects the conveyance of dower, on the contrary it confirms it, and leaves it as it stood upon the decision in *Lloyd v. Taylor*. The preamble of the first section is a plain recognition of the custom generally; and inasmuch as that part of the law which prescribes the ceremony of all future conveyances, has regard merely to the separate vested estate of the wife, and not to her right of dower, it follows that this case must be decided as though no new ceremony had been prescribed by the act. Had not that act been passed, certainly the demandant could not recover; or in other words, if that act does not apply to dower, the judgment below must be reversed. The argument against its applying is very strong. The title of the law is to establish a mode by which husband and wife may convey *their estates*, not the dower of the wife. The preamble to the second section carries on the same view, by defining the intention of the legislature to be, merely to establish a mode by which husband and wife may convey the *estate of the wife*. The effect of a deed acknowledged by the wife ac-

(a) 1 *Dall.* 17.(b) 1 *Dall.* 11.

ording to that section, is declared to be the same as if she were *sole*, in which case she would have no right of dower; and the section does not by any of its terms embrace a conveyance by the husband of his estate, but seems intentionally to leave it as it was before the act. So much was this argument pressed in the case of *Watson's Lessee v. Baily (a)*, and so many inconveniencies were shewn to result from the contrary position, that the court expressly decided in that case, that the act had no effect upon conveyances to bar the wife of dower, and stated that it was that opinion in a great measure which induced them to rule the case as they did. The protection of the wife's dower by no means results from requiring an acknowledgment. The husband may notwithstanding, without her participation, and against her consent, deprive her of this right by a mortgage.

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T. Ross for the defendant in error. The difference between this case and those of *Lloyd v. Taylor* and *Davey v. Turner*, is that the special verdict here says nothing of a usage, and there it was expressly proved as a fact to the jury. If such an usage is relied upon, it ought to be alleged as a fact, that an opportunity may be given to contest its continuance, or its validity upon any other ground. 1 *Tucker's Black.* 76. 79. *Money v. Leach (b)*. Its existence some years before the execution of this deed, between which periods an important statute intervened, is no evidence of its continuing to exist so as to govern the present case. Customs are frequently interrupted, not merely as to the enjoyment but as to the right; and a remarkable instance occurs as to land held by warrant and survey, which for more than seventy years after the settlement of the province, it was the custom to devise and transfer as personal property; but that custom was suddenly interrupted, and the property has for about fifty years been considered real estate. If however the court will recognise the existence of a custom to convey dower without a private examination in 1768, they will now take notice that it is abolished; and they will shew no favour to the custom, because it is in derogation of the common law. The act of 1770, did certainly notice the previous usage; but it states

(a) 1 *Bim.* 470.(b) 3 *Burr.* 1767.

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that many doubts were entertained of its validity, and it confirms estates before that time transferred in the customary way. From that time it abolishes the usage altogether, by devising a ceremony for all future conveyances of the wife's estate; and it does apply to cases in which the wife joins in the conveyance to bar her dower, as well as to any other. The very argument of the plaintiff in error proves it. The usage as to the conveyance of the fee-simple includes it is said a usage as to dower; if the law abolished the usage as to the greater, it therefore did as to the less. But terms cannot be stronger than those of the second section. The preamble it is true shews an intention to regulate the conveyance of only the wife's estate; but this term itself includes the contingent estate of dower; and when by the enacting clause, not only the estate of the wife, but her *right of in or to any lands*, is to be passed only by a deed with acknowledgment and privy examination, it certainly would not follow, even if the preamble did not include dower, that terms so broad and comprehensive would not. If a contingent right of dower is any thing, it is a right of in or to lands; and it certainly is something, or it could not be conveyed or released at all. The case then stands upon these principles. Dower is eminently favoured by the law, and the court should endeavour to protect it. At common law it cannot be released by a feme covert except by fine. An usage to the contrary must be strictly proved, and none is stated in the case. If the usage in 1768, is noticed by the court, then they will also take notice that it was the intention of the legislature to abolish it altogether, and that conveyances to bar dower were after the act of 1770 to be regulated only by that act. What is said by the court in *Watson v. Bailey* may be considered as extra-judicial. The cause did not turn upon that point, for it was a conveyance of the wife's fee-simple, which was clearly within the act of 1770.

The cause was argued at last *December* term, and in consequence of a division in the court, was held under advisement until this day, when the judges delivered their opinions.

TILGHMAN C. J. This case depends upon a single question. A married woman joined her husband in the execu-

tion of a deed, dated the 27th of *December* 1777, for the conveyance of land of which he was seised in his own right, in fee-simple. The deed was not acknowledged by the wife. Is she barred of her right of dower?

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It has not been contended, that a married woman can by her deed convey her right to land, by any principle of the common law; but it is said that she may do so by the custom of *Pennsylvania*. That she might have conveyed her right of dower by deed without acknowledgment, before the act of 24th *February* 1770, I agree. But since the passing of that act, the law has been altered. Although the charter of *Pennsylvania* extended the common law of *England* to this country, yet a practice very soon prevailed, and was long continued, for married women to convey not only their right of dower, but their own estates of inheritance, by deed, sometimes acknowledged before a judge or justice of the peace; and sometimes not acknowledged. The case of *Davey v. Turner*, 1 *Dall.* 11. was decided in the year 1764. There the wife acknowledged the deed before a justice, and expressed her consent on a private examination at the time of acknowledgment. The special verdict finds a custom in support of the conveyance for fifty years and upwards. The decision was in favour of the conveyance, and the judgment of the Supreme Court was affirmed on an appeal to the king in council. Next came the case of *Lloyd's Lessee v. Taylor* in the year 1768. 1 *Dall.* 17. The deed of a feme covert executed in 1727, was held good, even without acknowledgment, evidence being given that "it had been the constant usage of the province formerly, for married women "to convey their estates in this manner." These decisions were very proper on the principle that "*communis error facit jus*." But although it was reasonable to confirm the estates of innocent purchasers, acquired under a mistaken principle pardonable in the infancy of the province, yet it was high time to put a stop to a practice, under which the rights of married women were left too much unprotected. Accordingly we find that the attention of the legislature was attracted by the decision of the two cases I have mentioned, and on the 24th of *February* 1770, they passed an act on this subject.

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The title of the act is "for the better confirmation of the estates of persons holding or claiming under feme coverts, and for establishing a mode by which husband and wife may hereafter convey their estates." The preamble recites the custom "ever since the settlement of the province, in conveying the estates of feme coverts, in many cases for the husband and wife to execute the deed in the presence of witnesses only, and in other cases, after such execution, to acknowledge the same before a justice &c.", and the first section confirms estates acquired under deeds of this kind.

I have mentioned the words of the title and preamble, because an argument has been drawn from the expressions which seem to relate to the *estate of the wife*. It is inferred from thence that there was no intent to establish a mode whereby the wife might convey *her right of dower*. This argument would have weight, if the same expressions were used in the second section, on which this question principally depends. I would here remark however, that I am not satisfied, that even by the words of the title and preamble, there was no intent to include the right of dower. This right may in common parlance well enough be called an estate of the wife. I presume that the custom, which is spoken of in the preamble, must have extended to deeds by which married women meant to convey their right of dower; and I make no doubt but it was the intention of the legislature to confirm the estates of all persons who held under deeds executed in the manner described in the preamble, by which married women had conveyed their right of dower.

The second section is thus expressed: "And in order to establish a mode by which husband and wife may hereafter convey the estate of the wife," (still as I think, understanding by the word *estate*, every kind of interest which a woman could have in land belonging either to herself or her husband,) "be it enacted, that when the husband and wife shall hereafter incline to dispose of and convey the estate of the wife, or her right of in or to any lands, tenements or hereditaments whatever, it shall and may be lawful for them &c;" (then follows the mode of acknowledging the deed by the wife.) Now I think it cannot be denied, that the enacting words are broad enough to take in the right of

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dower. During the life of the husband the wife has a *right of dower* commenced, though not perfect till his death. It is such a right as she may pass, or at least extinguish, by her deed. Should it be granted then that the preamble of the second section does not extend to dower, still the enacting part comprehends it, and that is sufficient. The preamble ought not to control the enacting part of a statute, without very strong reason. In the present instance I see no reason at all. Why should a wife stand unprotected, when the husband wishes to bar her of her dower? Dower has been always favoured by the law. I believe the judgment of the Court of Common Pleas in this action, is the first decision directly upon the point, that has ever been given since the passing of the act. I know that it was mentioned incidentally in the case of *Watson v. Bailey* in this court; but it was not the question which the court decided. We have no *custom* here to contend with. The special verdict finds nothing about a custom. I will assert nothing positive as to the general mode of executing conveyances by married women since the act of 1770. But so far as the matter has fallen under my observation, it has been the practice to make no difference between deeds conveying a right of dower, and a right to lands of which the wife was seised in her own right. I make no doubt but some deeds have been executed differently; but I cannot allow that *that* should have any effect on the construction of the law.

It may be proper to take notice of deeds of mortgage of the husband's property. It is understood that by such deeds the wife may be barred of dower, though she was no party to the conveyance. But this depends on another principle, in which the law of *Pennsylvania* differs from the common law. The right of *creditors* prevails against the right of dower. A purchaser under an execution against the husband, takes the land discharged of dower; and the only mode of proceeding on a mortgage with us, is to sell the land by an execution. We have no court in which the equity of redemption can be foreclosed.

My opinion on the whole is, that the right of dower of the wife, is unimpaired by the deed which she did not acknowledge.

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YEATES J. The single question in this case is, whether a deed executed by husband and wife, if not acknowledged by the wife, will bar her of dower in lands of which the husband was seised during marriage in his own right?

It is not suggested that the baron here used any coercion or compulsion towards the feme, or that the conveyance was not made *bonâ fide* for a full consideration.

The recording acts have no effect on the case. There exist no subsequent purchasers of the same lands.

That a feme covert might bar herself of dower by deed here, without fine as in *England*, I believe never has been doubted in *Pennsylvania* since its first settlement. The much contested case of *Davey and wife's Lessee v. Turner*, and that of *Lloyd and wife's Lessee v. Taylor*, turned on the conveyances of lands which were the estate of the wife. In the latter there was no acknowledgment by the wife, in the former there was an acknowledgment according to the usage that had obtained. Previous to the act of 24th February 1770, it will not be denied, that a deed like that under consideration would bar the wife of dower. The true construction of that law must govern our decision.

In the case of *Watson and wife's Lessee v. Bailey et al.* 1 Binn. 470, I delivered my opinion at some length, formed on much consideration. The late Judge *Smith* fully concurred therein. I then thought that the law in question only respected estates held in right of the wife, and I have seen no reason since to change my sentiments. Our decision was founded on the whole act taken together, and the occasion of passing it,—its title,—preamble,—the professed object of the legislature declared in the beginning of the second section,—and the enacting clause. It has been said in some of our books, that the title of a statute is not to be regarded in construing it, because it is no part of the law. *Hard.* 324. 1 *Ld. Ray.* 77. But we find that great respect has been paid to the title of an ambiguous act of parliament; *Hob.* 232. 5 *Bos. & Pul.* 284; and in *Crespigny v. Wittenoom*, 4 *T. R.* 792, 3, it was agreed by the judges of the King's Bench, that though the preamble cannot control the enacting part of a statute which is expressed in clear and unambiguous terms, yet if any doubt arise on the words of the enacting part, the preamble may be resorted to, to explain it. In *Archer v. Be-*

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Lenham, 11 *Mod.* 161, the judges of the Common Pleas say, "in doubtful cases we may enlarge the construction of acts of parliament according to the reason and sense of the lawmakers, expressed in other parts of the act, or guessed by considering the frame and design of the whole;" and their words are repeated by *M^r Kean* Ch. Justice, in delivering the opinion of the court in *Levinz v. Will*, 1 *Dall.* 434. I will not now repeat the reasons which we then urged, but will content myself with observing, that if the intention of the lawgivers was, that the *mode established* thereby, should be pursued in the common instance of the wife joining her husband in the conveyance of his lands sold for their common interest, it would have been very natural for them to make use of the word *dower*, or some other term of the same import. An additional argument has been urged by the counsel of the present plaintiff in error, which also has weight. The words of the second section are in the conclusion of it, "every such deed and conveyance shall be, and the same is hereby declared to be, good and valid in law, to all intents and purposes, as if the said wife had been *sole*, and not *covert*, at the time of such sealing and delivery, any law usage and custom to the contrary in anywise notwithstanding." It seems incongruous to declare the deed of a married woman releasing her possible contingent interest in the lands of her husband, to be equally valid as if she had been unmarried at the time of its execution! It appears to me to designate plainly the act of the wife as to her own lands previous to her intermarriage. When we speak of the dower of the wife during coverture, we mean the future interest which she has in the lands of her husband in case she shall survive him.

If it be asked why the legislature would not use the same precaution to prevent a wife's being unduly stripped of her dower, as to secure to her the lands of which she was seised in her own right, I answer that the former was deemed sufficiently guarded by the fact being submitted to a jury, to determine whether she became a party to the deed freely and voluntarily. As far as my experience has gone, I have observed that deeds conveying the estate of the wife, have generally pursued with strictness the literal expressions of the act of 24th February 1770. Where the wife has been

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joined to preclude her from claiming dower, in case she survived her husband, the acknowledgments have been penned very differently, and in some cases, her consent has not been expressed therein. I have seen many instances wherein such deeds have been proved by the oath or affirmation of the subscribing witnesses, and never remember to have heard the validity of such deeds as to the wife questioned, unless the fact could be clearly ascertained that she was compelled to execute them against her will. It has been decided in this court, that the sale of the husband's lands under a *levari facias*, founded on a mortgage given by him alone, would bar his wife of dower. (I mention this, merely to shew how materially the settled law of dower in this commonwealth, varies from that of our sister states.) And even admitting, what I think highly equivocal, that the wife would often refuse to acknowledge a deed which she had executed in the presence of witnesses, she would seem to me to be placed on much safer grounds, by leaving the freedom of her will to be decided on by an impartial jury. I take it for granted that let the degree of coercion practised on the wife be whatever it might, she would be concluded by an acknowledgment made pursuant to the law in question.

I reduced the opinion, which I have delivered, to writing, shortly after the argument; but as it was judged advisable to make further inquiry into the practice, which had obtained under the act of 24th February 1770, I availed myself of the postponement, by carefully examining some of the books of records of the county wherein I live. My recollection on the subject I found not incorrect. I searched three of the record books of different deeds from husbands and wives after the passing of this law, and examined six hundred and eleven conveyances. Of that number only twenty-five deeds pursued the form of acknowledgment pointed out by the act. Ten of these deeds professedly conveyed lands whereof the wives were seised in their own right, and the greater part of the remaining fifteen did not recite the previous titles, whereby it could be ascertained in what right the lands were held. I have likewise been favoured with the researches of my professional friends in the counties of York and Cumberland, and the result of their inquiries shews, that a large proportion of the deeds recorded in those counties, are not

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founded on acknowledgments conforming to the act of 24th February 1770. It appears to me a serious inconvenience, that the wives surviving should, for a defect in the acknowledgments, be entitled to dower in the lands, for which they had joined in deeds with their husbands to fair purchasers for adequate prices. In *Ryalt v. Rowles*, 1 Ves. 365. Lord Chief Baron Parker expresses himself thus: "I admit in many cases the preamble will not restrain the general purview, as in 1 *Jones* 163, *Palm*. 485; but it is a rule, and so agreed there, that when the not restraining the generality of the enacting clause will be attended with inconvenience, it shall restrain." According to Lord Chancellor *Erskine* in *Mason v. Armitage*, 13 Ves. jr. 36, "If the enacting part of a statute will bear only one interpretation, the preamble shall not confine it; if that is doubtful, then the preamble may be applied to throw light upon it."

Upon the whole, after giving this case every consideration in my power, I am of opinion that the judgment of the Common Pleas should be reversed.

BRACKENRIDGE J. In reason, can there be a distinction found between that *right* which a feme covert retains in the real estate which she had before marriage, and that which she has acquired by her marriage in the real estate of the husband? The right which she has acquired in the real estate of the husband, is derived from the *Germans*, among whom it was a rule that a virgin should have no marriage portion, but that her husband should allot a part of his property for her maintenance in case she survived him. "*Dotem non uxor marito, sed uxori maritus offert.*" *Tacit. de Mor.* 18.

"It is a life estate derived from the law, and which a widow acquires in a certain portion of her husband's lands, tenements, and hereditaments, after his death, for her support and maintenance, which is called dower. During the coverture, the wife can acquire no property of her own. If before her marriage, she had a real estate, this by the coverture ceases to be her's; and the right thereto while she is married, vests in the husband. Her personal estate becomes his *absolutely*; or, at least, is subject to his control. So that unless she has a real estate of her own, which is

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"the case but of few, she may, by his death, be destitute of the necessaries of life, unless provided for out of his estate, either by a jointure, or dower." 1 *Cruise* 127. 134. The preceding citations have been made to shew the reason upon which the right of dower is founded, and entitled to the protection of the law; and, at the same time, to shew that it is not an estate *merely nominal* which the feme covert has in her husband's lands, but *substantial*, and standing upon the same foundations as her right to the estate which she had in her own right before. It is founded upon the marriage contract. The consideration is as good in law as any which could move from her in the purchase of an estate before marriage; and the life estate of which she is endowed by the marriage, is as absolutely in her, as any estate which could have come by descent, or acquisition.

Why is it then, that the law interferes with her alienation of this estate? It does not interfere to hinder her; but to provide that it shall appear to be her act. It is the humanity of the law in her behalf, having put her under the dominion of her husband to a certain extent, to take care, that an undue advantage shall not be taken of that subjection, to obtain from her by coercion, what she might not be disposed to grant of her free will and accord. Is she less liable to coercion by the husband in the alienation of this life estate, which the law has given her on her marriage, than of an estate in her own right before marriage? Or is she not more likely to yield to compulsion in the alienation of this estate, over which the husband may consider himself as having a control, and to which way of thinking he may be naturally led, from the circumstance of the estate having come by him? Is there not then at least equal reason for the provisions of the law, with regard to the solemnities of an act that shall bar her dower, as with regard to that which shall divest her of the estate which she had in her own right before marriage? But it may be immaterial whether equal or greater reason. The question will be, does the law make any distinction in form or substance, in the solemnities of alienation in the two different cases? The law of *England* makes none. The same solemnities in form and substance, are required in one case, as in the other. The right of either can pass no otherwise than by the solemnities of a fine. But in

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the law of *Pennsylvania*, is there a distinction? By the charter there was none. On the contrary it was provided, "that the laws for regulating and governing of property within the province, as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and chattels, shall be and continue the same as they shall be for the time being, by the general course of the law in our kingdom of *England*; until the said laws shall be altered by the said *William Penn*, his heirs, or assigns; and by the freemen of the said province, their delegates, or deputies, or the greater part of them." No alteration had been made by the laws agreed upon in *England*; nor is it pretended that any alteration had been made by act of assembly of the province, on the subject of the wife's estate in lands, as to solemnity of alienation, prior to the act of 1770; which, it is alleged, can relate only to the wife's estate before marriage. Will the alienation of her dower estate then remain as in *England*, and be alienable only by the solemnity of a fine?

In answer to this question, we are referred to the case of *The Lessee of Davey and wife v. Turner*, September term 1764, 1 Dal. 11, where by special verdict, a usage is found in the then province, *prout* verdict. The case in which that verdict was found, was that of the wife's estate before marriage. And it may be that the finding ought to be confined to the case of the alienation of such estate. But it is not contended, and should not be contended that it ought; for in that case, no usage being found with regard to the alienation of estates in dower, they would remain alienable only by a fine. And, if what is contended to be the more *independent estate*, that of the wife before marriage, was alienable under the usage, the estate of dower with less reason might require a fine.

The usage found in the special verdict, was that of "going before some justice of the peace, in the county where the lands lie, out of court, and for the said justice to examine the wife in private, and apart from her husband, respecting her signing and executing such deed, and to interrogate her whether she became a party to, and executed such deed, with her full and free consent; and, on her declaration that she freely consented, for the justice to certify the same under his hand and seal."

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We are referred in the next place, to the case of *The Lessee of Lloyd v. Taylor*, April 1768, 1 Dall. 17. In this case there "was not even an acknowledgment, or private examination." But, it appearing in evidence, that it had been the constant usage of the province formerly for femes covert to convey their estates in this manner, without an acknowledgment, or separate examination, and that there were a great number of valuable estates held under such titles, which it would be dangerous to impeach at this time of day, the court gave a charge to the jury in favour of the defendant, founded on the maxim, *communis error facit jus*; and the jury found accordingly. This was also the case of the wife's estate before marriage. If the usage however is not considered as extending to the alienation of a dower estate, it must remain alienable by fine only. But though there might be some reason for not extending it to the estate of dower, as more likely to be the subject of compulsion, and requiring greater solemnities in the alienation, yet it has been the universal understanding, and it is not pretended on any side of the argument in this case but that it did come under the *usage*. Why does not the usage then still exist with regard to the alienation of the wife's estate of dower? It has been decided that it does not exist with respect to the estate of the wife which she had before marriage. *Lessee of Watson and wife v. Bailey and others*. 1 Binn. 470. What reason is there why it should be considered as existing with regard to her right of dower? The reason is against the existence, or continuance of it, if we are correct in conceiving that, *ex majori cautela*, the provisions of solemnity ought to be in its favour, in consideration of the greater likelihood that she will be subject to compulsion where she is to pass an interest which may be considered as but nominally hers. It is said that an act of assembly, 24th February 1770, has put an end to the usage so far as respects the estate of the wife before marriage. Why not to the usage as respects the estate of dower? It is answered that it does not come within the intendment of the act. What ground of public policy or general inconvenience is there, to account for the legislature not intending to embrace the securing one estate to the wife, as much as the other? The terms embrace it: "*her right of, in, or to* any lands, tenements or hereditaments *whatsoever*." But

the act was in consequence of the question made in the cases of *Davey and wife v. Turner*, and *Lloyd's Lessee v. Taylor*, which were both cases of the wife's estate before marriage; and the introductory words of the section speak of establishing a mode by which husband and wife may convey the estate of the wife. Few general laws are enacted, to which particular cases have not given rise; and though it is a sound construction of the decision of a court, to confine it to the case under adjudication, yet the preamble of a law has never been considered as restraining the enacting words of the law, to the particular case recited in the preamble, upon the ground of its having attracted the attention of the legislature in making the law. The courts of law, taking the preamble into view, have restrained or enlarged by it, according to their ideas of the policy of the enacting part. And they cannot do otherwise, because it is the only principle by which they can undertake to determine, where the terms are liable to different constructions, what the legislature intended to embrace. It is no uncommon thing for the general remedy to be intended to overleap the particular mischief; for where there is the same mischief, there is the same reason for that remedy. And in the case of a remedial law, the construction is to be liberal.

In the case before us it cannot be questioned, but that the wife's right of dower, though not *eo nomine*, is her estate, in a most especial point of view; and is regarded in the law with the most peculiar attention. "The tenant in dower, is so much favoured, as that it is the common by-word in the law, that the law favours three things, life, liberty and dower;" and a widow's right of dower commences with her marriage. It is held so sacred a right, that no judgment, mortgage, or recognisance, or any incumbrance whatever made by the husband after marriage, can at common law, affect her right of dower. Even the king's debt cannot affect her. 1 *Dalh.* 484.

The cases of *Davey and wife v. Turner*, and *Lloyd v. Taylor*, in which the usage came in question, respected the alienation of the wife's estate before marriage. But it cannot be assumed, but that cases may have existed, or have been more numerous before this period, or before the act of assembly, where the alienation affected the right of dower. Was the de-

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fect of solemnity in these cases not contemplated by the act? Or, were they left on the ground of usage as sufficient to protect them? These cases were certainly within the like reasons, and required the like relief. I can devise no reason why the legislature should not have left the one class of cases to the usage as well as the other, unless they had intended to withdraw the protection of the law from the estate of dower, and leave it to the wife to dispose of it, *coerced or not* as the case might be, and that her simple signature proved, should convey the estate, as if *solé*. It is contended that this was the case. This construction receives countenance from the act of assembly of 1700, which subjects lands to the payment of debts, without any saving of the wife's estate of dower; and from the judicial construction of the act, that such saving cannot be inferred. And what is still more, it *has been* determined that on a mortgage executed by the husband, though the wife be no party to it, the wife's dower is bound, and her estate passes by the sale. This is determining it to be in the power of the husband, by mortgage or by subjecting to judgment, to have the estate sold, and barred of dower. Did the law then mean to leave an estate *so precarious*, without any special protection of an act in its favour? Or shall we so construe it, as applying the maxim *de minimis non curat lex*?

That the terms of the act of 1770, may admit of a construction unfavourable to the protection of dower in the solemnities of alienation, is certain, because the judges of this court, then sitting, in the case of *Watson's Lessee v. Bailey*, did put a construction upon it, unfavourable to the protection of the right of dower, by confining the act, as they declared, to the *case of the wife's estate before marriage*. It is true that the point decided, did not necessarily involve this question, and that what was said, must in strictness, be considered as incidental; yet it as clearly appears what their opinion was, as if on the point directly decided. For, it is given as a ground of their decision, that a *distinction* did exist, and that the act did not extend to the case of the *wife's estate of dower*; at least it is assumed as narrowing the extent of the objection which might be made on the ground of unsettling estates. Yet the effect of the acknowledgment upon the wife's *right of dower* not being the point immediately

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before the court, the observations in strictness come under the head of *obiter dicta*, and have the weight of reason, not of *authority*, which are very different things in all cases of the "*non ita refert quæ sit lex, quam quod sit nota*;" and this partakes somewhat of the nature of those cases, not derived so much from the principles of moral right, and natural justice, as positive institution. I consider myself therefore as not departing from the maxim of *stare decisis*, in canvassing the reason of what is said in that case as to this point. And I observe that the consideration which is expressed by the court, the "unsettling estates," does not weigh so much in the case of dower, which is but a life estate. Dowagers being generally advanced in years, the estate in the hands of a purchaser cannot remain so long incumbered with the claim; and the construction of the law settled, will prevent future uncertainty. I apply myself therefore, unembarrassed with these considerations, to examine the words, and the bearing of the act.

The words, "*estate of the wife*," unquestionably lead one to think only of that estate which she had before marriage. In common parlance this would be taken to be the application, and the terms *right of, in, or to any lands &c.* would be taken as saying nothing more than what had been said under the word *estate*; being, in the language of acts of the legislature, repeated in other terms, for the sake of greater certainty in the extent which was meant to be given them. But a more extensive knowledge of the law would carry the mind to those estates, which might not be called the wife's, strictly speaking, because she had never come to the possession of them; estates in remainder, in reversion, &c. And I take it the common mind would not think of the *right* of dower as the *wife's estate* at all, until after the husband's death. But in legal acceptance it is the *wife's estate*; and right of, in, or to, will embrace the right of dower. In this doubtful case what shall govern? Exposition by usage? I know nothing of that. It is not found by special verdict what it has been, under, or since this act. Nor is it even matter of notoriety to me how it is, could I be supposed in that case to take notice of it. "The expounding by usage," is out of the question; for I cannot judicially have it before me. Out of the *terms* I can look only to the policy of the act, and the

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effect of the construction; *à parte ante*, and *à parte post*. This must be the ground of consideration. For it is the effect of a construction that must govern, where we inquire into the extent of terms in a dubious case.

In construing the act liberally in favour of protecting dower, it is possible that there may be cases where, against good conscience, dower may be claimed; where in fact there was a voluntary alienation, and the *bona fide* purchaser may be subject to the incumbrance of a life-estate. But, in that case, he has his remedy against the representatives of the husband who undertook to dispose of the whole, and received a consideration as for the whole estate. And the cases must be few where coercion actually did take place; or where, against good conscience, it is alleged; or where indemnification cannot be had against the husband's estate in the hands of his representatives. But the effect of extending the provisions of the act in favour of dower is permanent; and upon that ground I have brought my mind to construe the act as embracing the right of dower, under the words of the act, "*right of in or to any lands, tenements, or hereditaments whatsoever*." At the same time I cannot get over the express words to my satisfaction, *right of &c.* were I disposed to confine them to the wife's estate before marriage, and to construe them as explanatory of what is meant by the wife's estate, viz. not only her estate in possession, but in expectancy; not only the fee itself, but the right appurtenant of way, &c. For, if we leave out the pronoun *her*, and repeat the noun for which it is used, viz. the word *wife*, the sentence will be, wife's estate, or wife's right of, in, or to, which bringing it more explicitly to the mind, renders it more difficult to say that wife's right of dower is not included.

Legislative construction is of weight in a doubtful case; and in an act of 20th January 1806, extending the power of taking acknowledgment of deeds to the aldermen of the city of Philadelphia, the words are to take and receive *the separate examination* of any *feme covert*, touching or concerning her *right of dower*, or the conveyance of her estate or right in or to any such lands, tenements or hereditaments, agreeably to the act of assembly entitled "an act for the better confirmation of the estates of persons holding or claiming

* under *feme covert*s, and for establishing a mode by which "husband and wife may hereafter convey their estates, passed 24th February 1770." Why the words, the separate examination of any *feme covert* respecting her right of dower, if it had not been considered that the acknowledgment of the feme in the case of dower, must be on a *separate examination*? And why a *separate examination*, unless with a view to ascertain the mind with which she did the act? It is by implication, a construction. It is impossible not to see that the legislature took it for granted that in the case of dower, as well as in that of the wife's estate before marriage, the separate examination was to take place.

This language of the legislature goes at least some length to shew the general understanding of the country; and upon all the inquiry I have been able to make, by an inspection of acknowledgments in the case of a dower estate merely, I do not find any distinction made, but that it has been the general understanding that the cases were the same. Nor in the course of my professional practice do I recollect a distinction suggested, except by the register of *Alleghany* county, who alleged, that such distinction was known in the county of *Dauphin*, where he had resided. On the ground of usage or custom, I have not sufficient to justify a conclusion, that the original usage of the state has been continued, and that the case of dower has not been considered as coming under the words of the act of assembly of 1770, for the taking the acknowledgments of feme coverts in the passing their estates.

Judgment affirmed.

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Philadelphia,
Monday,
March 26.

The Commonwealth against Rosseter and others,
Trustees of St. Mary's Church.

The court will not grant a *mandamus* to the trustees of an incorporated church, to restore the prosecutor to the possession of a pew to which he claims title, inasmuch as he has another remedy by an action on the case against the person disturbing him.

IN this case *Heatley*, upon the following affidavit, obtained a rule to shew cause why a *mandamus* should not issue to the defendants, to restore *James Corkrin* to the possession of a pew in *St. Mary's* church.

"*James Corkrin* being duly sworn &c. doth depose, that for the space of nearly twenty-five years he was in the peaceable possession of the pew No. 55, in *St. Mary's* church, for which the accustomed rent was paid up until the month of *August* 1808, when he and his family were dispossessed of said pew, by the order of the abovenamed trustees, by Mr. *Joseph Snyder*, styling himself secretary to the trustees of *St. Mary's* church, and have since sold or disposed of said pew to a certain Mr. *Amos Holahan*. By reason of which, this deponent and his family are deprived of a situation, which they have been long accustomed to enjoy, and proper for the performance of their religious duties, said church being an incorporated society, and every pewholder under the act of incorporation considered a freeholder."

Hopkinson for the defendants shewed cause. This is not a case in which a *mandamus* should go, because the prosecutor has another specific remedy. Take it first according to the affidavit, that he has a freehold in the pew. There is no instance in which a *mandamus* has issued to give possession of a corporeal freehold. If he has merely a possessory right by lease from the corporation, he may maintain an ejectment, which is a remedy completely specific. But if he has a right which is not sufficient to maintain an ejectment, as is the case generally in *England*, where the possession of the church is in the parson, and therefore trespass will not lie by a pewholder, he has a remedy by action on the case against the person who disturbs him. There is no doubt that such an action may be maintained, and that it is the mode of

redress exclusively adopted in *England*. *Francis v. Ley* (a), *Dawney v. Dee and others* (b), *Kenrick v. Taylor* (c), and *Stocks v. Booth* (d) are all to the point. If a *mandamus* should be granted in a case like this, there is no instance where title is in dispute, in which it might not be granted with equal propriety.

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Heatley for the prosecutor. To deprive a pewholder in *St. Mary's* of a pew, is a kind of minor excommunication; it takes away his rights as a member of the corporation. Act of Incorporation, 13th September 1788. And therefore a *mandamus* to restore him to his pew, is in effect to restore him to his membership. If he brings an ejectment, he asserts by the action that he is still a member of the corporation; and then he defeats his action, because as a corporator, he cannot maintain an action against the corporation. The action on the case for a disturbance, though often used, is not a specific remedy, because it gives the party damages and not possession; and therefore the common principle on which the *mandamus* is justified, applies here. A *mandamus* lies to restore a party to his stall in the choir of a church, which is an analogous case. *The King v. The Dean and Chapter of Dublin* (e). So to restore a curate to a chapel. *The King v. Bloer* (f), *Bull. N. P.* 200.

The cause being argued on the last day of December term 1809, was held under advisement until this day.

TILGHMAN C. J. This case arises on a rule on the defendants to shew cause why a *mandamus* should not issue, commanding them to restore *James Corkrin*, to the possession of a pew in *St. Mary's* church.

A *mandamus* is a remedy of a special nature, resorted to where a man has no other specific mode of relief. The complainant has not shewn a case of that kind. He says he has title to the pew in question. If so, he has a specific remedy by an action at common law against the person who disturbs him in the enjoyment of his pew. These actions have been very common both in ancient and modern times. Four cases

(a) *Cro. Jac.* 366.

(b) *Cro. Jac.* 605.

(c) 3 *Wils.* 326.

(d) 1 *D. & E.* 428.

(e) 1 *Str.* 536.

(f) 2 *Burr.* 1043.

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were cited, of actions on the case for disturbance of this nature. *Cro. Jac.* 366. *Id.* 605., 1 *Wils.* 326., 1 *D. & E.* 428. I have examined these cases, and in not one of them was there the least doubt of the action being maintainable, provided the plaintiff proved his right. Writs of *mandamus*, not being so convenient for the trial of title, as the usual common law actions, are not to be unnecessarily multiplied. I am therefore of opinion that the rule should be discharged.

YEATES J. To found an application for a *mandamus*, the established rule of law is, that there ought in all cases to be a specific legal right, as well as the want of a specific legal remedy (a). The courts of justice uniformly refuse such applications, where the party has another complete remedy (b), unless, as it is said in some cases, the remedy be extremely tedious (c). It is evident that it would be highly inconvenient to try civil rights in this mode of procedure, when the party may institute a suit in the ordinary legal course, and if injured, obtain a complete satisfaction measured out to him by a jury, equivalent to a specific relief.

It is an insuperable obstacle to this application, that the law has provided for Mr. *Corkrin* an adequate remedy, if he has been injured in the possession of a pew in the church, to which he is entitled. Numerous authorities in our books shew, that the title to a seat in a church, is properly triable at common law by action on the case. And it cannot be objected against the present applicant, that he is a member of the corporation of *St. Mary's* church, because the character of corporator does not divest him of his ability to maintain his action for an injury done to his civil rights. It is clear to me that the present rule must be discharged.

BRACKENRIDGE J. was of the same opinion.

Rule discharged.

(a) 8 *East* 219.

(c) 2 *Str.* 1082. 2 *Burr.* 1045.

(b) 1 *Ld. Ray.* 38. 3 *Burr.* 1615. *Camp.* 378. *Doug.* 508, (526).

MACKIE *against* PLEASANTS.

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EXCEPTIONS to a report of referees.*Philadelphia,*
Monday,
March 26.

This action was brought upon two policies of insurance, dated the 25th of *March* 1809, and signed by the defendant, as president of the United States Insurance Company. The one was on the "good *British* brig called the *John*," valued at 8000 dollars, and the other upon her freight, valued at 4000 dollars, at and from *Havanna* to *Baltimore*, at a premium of four per cent. At the bottom of each policy was written a memorandum, that the insurance was "declared to be against perils and dangers of the sea only, and to end on capture."

The brig and her cargo were totally lost upon a reef of rocks on the 19th of *March*.

The referees to whom the cause was submitted under a rule of court, reported in favour of the plaintiff as for a total loss; and to this report the defendant filed the following exceptions.

1st. That the terms "*British* brig" amounted to a warranty that the vessel was a *British* brig, the proof of which fact was indispensably requisite to the plaintiff's recovery. But no such proof was furnished to the referees. On the contrary it was in evidence, that the said brig had not a *British* register, or any other document, giving to her the character and privileges of a *British* vessel; and it was not pretended by the plaintiff, nor was the least evidence offered to the referees to shew, that she was a *British* built vessel.

2d. That if the terms in the policy did not amount to a warranty, the order of insurance, which was in the same language, was a representation that the brig was a *British* vessel, which was material, and should have been substantially proved. But no such proof was furnished to the referees.

3d. That it was proved to the referees that the brig was not seaworthy when the risk commenced.

Upon the examination of the referees, who were all merchants and underwriters, they stated, that it was proved to them that the brig was condemned as unseaworthy at *New*

A vessel, stated in the body of the policy to be the "good *British* brig called the *John*," was insured at the usual sea risk premium from *Havanna* to *Baltimore*, with a written memorandum at the foot of the policy, that the insurance was against perils of the sea only, and was to end on capture. Held, that the words "*British* brig," even if a warranty, did not imply that she was a *British* registered vessel, but merely that she was owned by a *British* subject; and it being proved that the owner was a *Scotchman* by birth, and that he navigated the vessel under a clearance and licence from the *British* customhouse at *New Providence*, this was sufficient *prima facie* to shew that he continued to be a *British* subject, without shewing his domicile or place of habitual residence.

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Providence, a short time before the voyage insured, and was bought by *Mackie*. That this condemnation they believed was produced by bribery, the brig having before that belonged to an *American* of the name of *Toby*, who had sailed in her from the *United States* to the *West Indies*, and who himself requested the survey and condemnation. That *Mackie* navigated her from *New Providence* to the *Havanna*, where considerable repairs were done upon her. That having taken in an entire cargo on freight, he sailed from the *Havanna* on the 11th *March* at 3 P. M. having several masters of vessels on board as passengers, and that at midnight, upon the pumps being sounded, though there had not been any bad weather, it was found that there were two feet of water in the hold, in consequence of which she put back. That the leak was ascertained to be in the side of the brig, which had not been perfectly caulked; but that after caulkers were obtained, the leak was very soon repaired, and the brig sailed again on the 16th, and was lost on the 19th. That most of the brig's papers were lost at the time of the shipwreck, and among them as was stated by a witness, clearance and licence from the customhouse at *New Providence*. But there was no register.

The grounds upon which they made their report, the referees said were these. They did not consider the terms "*British brig*," as a warranty, but as description only, and immaterial to the risk. That this opinion was founded upon the position of the terms in the policy, it being the usage in *Philadelphia* to insert every thing that was intended to be a warranty, in a written memorandum at the foot of the instrument. That they thought it immaterial, because the insurance was only against the sea risk, and the premium was the common rate for that risk at that season of the year, upon vessels that were known; and therefore they did not require proof of a register. That they were of opinion however that *Mackie* the owner was a *Scotchman*, partly because he had a very broad *Scotch* accent, and partly because he had brought a letter of introduction from *Scotland* to a gentleman in *Philadelphia*, and had also stated to a witness such circumstances in relation to a family in *Scotland*, as the witness believed that no one but a person intimately acquainted there, could know. But that they had no evidence of his domicil or residence

at the time of the insurance, or that he had ever changed the domicile of his birth. They were perfectly satisfied that as a description it was well proved; but one of them said, that had he considered it a warranty, he would have required more proof. With respect to seaworthiness, they were clear that the brig was seaworthy, when she sailed the second time; and they supposed the leak had arisen from the accidental omission of a foot of oakum.

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Binney and *Rawle* for the defendant. 1. The terms "British brig" in the body of the policy, are a warranty. They are a written declaration upon the face of the policy, of a fact in respect to the subject insured, which is the proper definition of a warranty. *Park* 318, 319. *Marsh.* 248. *Goix v. Low* (a). The referees have made a plain mistake in supposing that the place where the declaration is inserted is material, and that usage controls the law in ascertaining what is a warranty. The warranty may be at the bottom or at top, it may be written transversely or otherwise. The place and the manner of writing it are alike immaterial. *Bean v. Stupart* (b), *Park* 322. In *Goix v. Low* the insurance was "on the American ship *Minerva*," which words were in the body of the policy, like these; and by three judges against one, it was held to be a warranty. *Le Mesurier v. Vaughan* (c) is to the same purpose. The insurance was stated to be on the good ship called "the American ship *President*;" the order was to effect insurance on the good American ship called the *President*. It was a plain mistake by the broker; and the court agreed that the underwriter had lost a warranty by it; that is, it would have been a warranty, if the order had been pursued. So in *Lothian v. Henderson* (d), which was an insurance on "the *Catharine*, an American vessel," it was agreed by all the judges that such a description amounted to a warranty. The objection to its being a warranty, is that it was immaterial, because the policy was against sea risks only. But whether material or not, is not the question. It is of no importance for what view a warranty is introduced, or whether the party had any

(a) 1 *Johns. Cases* 343.(b) *Dougl.* 12.(c) 6 *East* 382.(d) 3 *Bos. & Pul.* 499.

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view at all. *Park*, 318, 319. *De Hahn v. Hartley* (a). Of course materiality is no test of a warranty. But in fact it was material. The embargo had been in force fifteen months at the time of this insurance. No *American* vessel, it is probable, could have been at that time lawfully employed in the *West Indies*. All were subject to seizure and detention by the *American* cruizers. *British* vessels properly documented, were not; and it therefore became material that the risk should be *British*. The limitation of the policy to sea risks did not affect the materiality. The insurance was to cease upon *capture*, but not upon *detention*; and although a limited policy, the insured might even have deviated to avoid arrest. *Scott v. Thompson* (b), *Robinson v. The Marine Insurance Company* (c). If detained, the sea risk might therefore have been prolonged and increased; and the same would have been the result of a deviation to avoid arrest. Both these liabilities to an increased risk, were peculiar to an *American* vessel. A *British* vessel was subject to neither. The mere sea risk of *British* vessels is less than any other; they are better found and navigated.

Supposing it to have been a warranty, it meant that the brig was entitled to the privileges of a *British* vessel. *Tabbs v. Bendelack* (d). She must be *British* to the purpose of being protected, and must be documented as such. *Barzillay v. Lewis* (e). If the *English* navigation laws are resorted to for the definition of a *British* vessel, she must be *British* built, owned, and registered. Such alone are by the express words of the statutes, *British* ships. 26 *Geo.* 3. c. 60. sec. 1., 27 *Geo.* 3. c. 19. sec. 13. It has never been decided that any other vessels are at this time entitled to the protection of the *British* flag; none else are subject to the convoy acts, whose object is protection. *Long v. Duff* (f). If the commercial import of the words is adopted, they cannot mean less than that the owner was a *British* subject, residing in the dominions of *Great Britain*. It is not enough that he is a subject. Where there is nothing special in the conduct of the vessel, the national character is determined by the *residence* of the

(a) 1 *D. & E.* 346.(b) 4 *Bos. & Pul.* 181.(c) 2 *Johns.* 89.(d) 1 *Marsh.* 386. 2d ed.(e) 1 *Marsh.* 398. 2d ed.(f) 2 *Bos. & Pul.* 209.

owner. *The Vigilantia* (a), *The Citto* (b). *The Indian Chief* (c). *Tabbs v. Bendelack*. As to all the purposes of commerce and war, men are identified, and so is their property, with the country where they reside. It is residence and not domicil that gives the national character to a ship. A man may reside half his life in a country without acquiring a domicil, if he always keeps alive an intention to return shortly, and is prevented. But he acquires national character, as to the purposes of war and commerce, by even a short residence. To entitle the plaintiff to recover, he should therefore have proved, either that the brig had a *British* register, or that he resided in the dominions of *Britain*; and the referees having reported without proof of either, have committed a plain mistake in law.

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2. The exception upon the materiality of the representation, has already been argued under the first exception.

3. The policy attached while the brig was at *Havanna*. If she was not seaworthy then, though she might become so afterwards, the underwriters are discharged. Now although seaworthiness is a fact, yet if the referees have made a plain mistake in fact, their report must be set aside; and it is impossible to argue, that a vessel which, without any weather, leaks two feet in less than seven hours, is seaworthy. The referees should have asked the strictest proof, because the brig had been condemned as unseaworthy a short time before.

Smith and Ingersoll for the plaintiff. 1. The only expressions relied upon to form a warranty, are those connected with the name of the ship, which we contend are mere description. There is certainly no express warranty, or declared intent to warrant. If such an intent existed then, it must be shewn from extrinsic circumstances. If it is a warranty, no doubt it must be performed whether material or not; but we are entitled to resort to circumstances, not only to explain the meaning of it, but to shew that the parties did not intend it to be a warranty. It is in the first place no warranty according to judicial decisions. The terms are used merely to identify the subject insured; they are matter of description,

(a) 1 Rob. 11.

(b) 3 Rob. 37.

(c) 3 Rob. 22.

1810. and not of qualification; and in such a case, a mistake is of no moment, where it does not affect the risk, or where the vessel is known to the insurer. 1 *Marsh.* 221. 1 *Emerig.*

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PLEASANTS. 164. In *Goix v. Low* the majority of the court did not go upon the force of the terms themselves, but upon particular circumstances in the case. In *Le Mesurier v. Vaughan*, what is said of the warranty is extrajudicial; and *Le Blanc J.* plainly implies that the circumstance of its being written on the policy, does not make it a warranty, because he recommends to insurers to examine the policy, and see whether what is written, is matter of description or warranty. In *Lothian v. Henderson*, the terms came in after the description, as matter of qualification; and there still being a doubt in the parties, they agreed it to be a warranty, by a distinct writing, before the loss. In the next place the terms were not intended to be a warranty. The practice of underwriters cannot prevent that from being a warranty which is so in point of law; but it is a safe guide to intention. Had the defendant intended to make it a warranty, he would have put it in the usual place at the foot of the policy. The invariable usage is so. It is done to avoid uncertainty. The deviation from the practice shews that certainty as to the character of the vessel was already obtained, or was not wanted. The premium is another guide to intention. It was at the usual rate of sea risk upon vessels that were known; that is, had not the vessel been known, a higher premium would have been asked, or uncertainty would have been removed in the usual way. The limitation to perils of the sea, is another guide. *Prima facie* the national character of the vessel is of no importance upon this risk. Unless an evident design to warrant it, is shewn, it ought not to be presumed.

But if a warranty, it was proved to the referees. A warranty is to be strictly complied with in favour of insurers, but it is to be strictly construed in favour of the insured. It must be construed according to the commercial import of the terms, 1 *Marsh.* 249; and if in any sense used by merchants, the vessel was a *British* brig, the referees are right. It is not necessary that she should be a *British* registered vessel. The *English* navigation acts do not prevent *British* subjects from owning foreign built vessels, or deprive them of the protection of the *British* flag. The question is not

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what is a *British* vessel within those acts, but within this warranty; and certainly within this warranty, and to the purpose of being protected, a foreign vessel *British* owned, is a *British* vessel. A register is not one of the documents required in any case to shew the national character of a vessel. *Marsh.* 347. 319. A bill of sale, a clearance, and a licence, are competent to this purpose, and the *John* had all these. She was moreover owned by a *British* subject, who was born, and lived in *Scotland*, and had not for any thing that appeared, changed his residence. This would be sufficient even upon the most liberal construction of the warranty. Such a vessel is as much entitled to the protection of the flag of *Great Britain*, as one having a register; and although she is not bound to take convoy, yet this is a fact which the underwriter must inquire into himself. The insurer is not bound to disclose it. *Long v. Duff, Marsh.* 284. How much more do the proofs given, satisfy the warranty upon a strict construction, made with reference to the intention of the parties. The register was of no importance to this risk. It would have given the brig certain privileges in an *English* port, but none out of it; and if the object was merely to avoid detention by *American* cruisers, that would happen as certainly in the case of a vessel *British* owned, as of one *British* owned and built. Whether the words then are taken as description or warranty, they have been sufficiently proved, and the referees have not erred.

2. The second exception has been answered.

3. The third exception is matter of fact; and unless the referees have committed a plain and obvious mistake, it will not vitiate their report; for the decision of facts is peculiarly their province. The condemnation at *New Providence* implies nothing against the brig. It was produced not by *Mackie*, but by the former owner, and as the referees say, by bribery, not by the actual condition of the vessel. She was repaired at *Havanna*; and it was not any radical defect in the vessel, but either the omission of a small piece of oakum, or the working of it out by the sea, that produced the leak. The referees had a right to say whether this made the vessel unseaworthy when the policy attached, and they have said that it did not.

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The cause was argued at *December* term last, and held under advisement until this day.

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TILGHMAN C. J. This case comes before us on exceptions filed by the defendant to the report of referees. The material exceptions are two. 1st. That the policy of insurance on which the action is founded, contains a warranty that the vessel insured was a *British* vessel, which warranty was not complied with by the assured. 2d. That it was proved to the referees that the vessel was not seaworthy.

The second exception may be easily disposed of. Seaworthiness was a matter of fact, on which the referees decided according to the best of their judgment, on the evidence produced to them. It must be a very strong case indeed, which would induce the court to set aside an award, because the referees had erred in matter of fact. Without entering into particulars, I do not think the fact by any means so clear, as to warrant the setting aside of the award on that ground.

The *first* exception involves matter of greater difficulty. The insurance was on "the good *British* brig" called the *John*, and her freight, at and from the *Havanna* to *Baltimore*. At the foot of the policy was a memorandum as follows: "declared to be against perils and dangers of the seas *only*, "and to end on capture." The premium was four per cent.

It was urged on the part of the defendant, that the expressions "the good *British* brig," amounted to a warranty, that the brig was a *British* registered vessel, properly documented to entitle her to all the privileges attached to such vessels. On the contrary it was contended, for the plaintiff, that this was not a warranty, but a description of the vessel, which was sufficiently complied with by proving to the referees, that the brig belonged to a *British* subject; and the plaintiff's counsel placed some reliance on the custom of putting the express warranties, intended to be made by the assured, in a written memorandum at the foot of the printed policy.

I do not think it very material whether the expression, "*British* brig," is to be called a *description* or a *warranty*; since it is allowed on all hands to contain an assertion, which the assured is bound to maintain. But it appears to me most

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proper to call it a warranty, as it is a fact, not altogether immaterial, averred by the assured, and inserted in the policy. Whether it is in the body of the instrument, or in a memorandum at the bottom, can make no difference as to its being a warranty or not. The material question is, what is the meaning of it?

The words, "*British brig*," may have several meanings. Strictly speaking, a vessel owned by a *British* subject is a *British brig*. Or, they may have a more extensive signification; a brig not only *owned* by a *British* subject, but having a *British* register, &c. In ascertaining the meaning, I think it fair to resort to circumstances disclosed in other parts of the instrument. In that point of view, it is material, that the insurance was against *perils of the sea only*; so that it is not to be supposed, that the privileges attached to a registered vessel, entered into the contemplation of the parties, because those privileges could avail nothing against storms and tempests. And here it may be proper to take notice of the custom of the insurance officers, to insert at the foot of the policy, such matters as they think of sufficient importance to make the subject of a special warranty. These memorandums are generally expressed in plain terms, without regard to form; and I cannot help conjecturing, that if the insurers had contemplated a *British* registered vessel, they would have had a note of it at the bottom, without trusting to the general expression, "*British brig*," in the descriptive part of the policy. Considering the whole of the instrument, I am of opinion, that the expression "*British brig*," is to be understood, a brig owned by a *British* subject.

The next question is, whether the warranty thus understood, has been complied with. The referees say it was proved to their satisfaction, that the owner was a *British* subject. They have been examined, and given their reasons, with which I cannot say that I am dissatisfied. Upon the whole therefore, my opinion is, that the defendant has not shown sufficient cause for setting aside the award.

YEATES J. After stating the facts and exceptions, proceeded as follows:

There is a material distinction between a *warranty* and a *representation*. A representation may be *equitably* and *sub-*

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stantially answered; but a warranty must be strictly complied with. A warranty in a policy of insurance is a condition or contingency; and unless that is performed, it is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it is literally complied with. *De Hahn v. Hartley*, 1 Term Rep. 345. *Park (a)*, and *Marshall (b)*, make a further distinction between them, which is indeed sufficiently obvious. A warranty makes a part of the written policy. A representation is a state of the case, not a part of the written instrument, but collateral to it, and entirely independent of it. The same observation is made by Lord Mansfield in *Pawson v. Watson*, Cowp. 785. But it by no means necessarily follows, that all matters stated in policies amount to warranties. In *Le Mesurier v. Vaughan*, 6 East 387, *Le Blanc* Justice says, the decision in that case would induce underwriters and brokers to read policies before they were subscribed, and to see whether what was written contained matter of *warranty or description*.

I agree, that the authorities cited fully shew, that if a warranty be written either straightly or transversely in the margin of the policy, it must be strictly followed, as much as if inserted in the body. But the question here recurs. Is this a warranty? What was the meaning and understanding of the contracting parties, when they made use of the expressions "*good British brig?*" Does it appear that they intended thereby to designate or identify the brig, which was the subject of insurance, or that the insured should warrant her to be a *British* bottom duly registered, within the terms of the *English* navigation acts of 26 G. 3. c. 60. and 27 G. 3. c. 19., accompanied with all the documents required by those statutes?

These facts are established by the testimony of the referees who were examined on the argument. The premium of *four per cent.* paid to the company was no more than the common sea risk; in the usual course of business of insurance, with which they had been much conversant, a greater premium would have been required, if the vessel had not been known; and all the cargo was on freight. They further

(a) *Park* 321. 1st ed.(b) 1 *Marsh.* 337. 341.

testified, that the accustomed method, as well of the insurance corporations as of individual underwriters, is to insert all warranties at the *foot* of the policy.

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I do not mean to assert that it is indispensably necessary in this port, that a warranty shall be placed at the bottom of the instrument, or that commercial usage shall control settled established law. All I contend for is, that a policy should be construed according to the understanding of merchants, and observed with the purest good faith; and that in insurance cases in particular, mercantile usage must determine the precise meaning of the words. 1 *Mars.* 227. The intention of the parties, and not the literal meaning of the words, is to be attended to in the construction of policies. *Park* 83. 49. 1st ed. Their intention is if possible in the first instance to be collected intrinsically from all the expressions contained in the written instrument; but where that is silent as to the object of research, it may be fairly inferred from extrinsic circumstances, the perils intended to be guarded against, and the relative state of the vessel at the time. It is not expressed in this policy, whether the clause was introduced as a warranty or not; but it is of moment that the parties have declared, that the insurance was to be against the perils and dangers of the sea *only*, and to end on *capture*. Whether the brig was really and *bona fide* a *British* bottom, and duly registered as such, or whether she was the property of a *British* subject, neither added to nor diminished the hazards of the underwriters. In either case, her capture would depend on the same grounds and principles; and the risks to be run would be proportioned to the goodness of the vessel, and the nautical skill of the master and mariners on board. The premium of a sea risk is only demanded, on the voyage of a known vessel. But whence comes it, that the directors of the United States' Insurance Company did not insert the words now relied on as a warranty, in the accustomed part of the policy, where warranties are introduced by the commercial usage of *Philadelphia*? It is not insisted that this is necessary in order to give those terms the effect and force of a warranty, if they were really intended to have had that operation; but it is a circumstance of no inconsiderable weight as to the defendants, that by premitting their former habits, they have evinced their understanding of the

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contract, as not amounting in this particular to a warranty. The natural, plain and obvious meaning of the adjective *British*, points to the quality of the subject of insurance, and serves as an adjunct for the purpose of identification, not material to the risk insured against.

I am by no means satisfied that this clause imports a warranty on the part of the insured; and the strong inclination of my mind is, that it is answered by proof that a *British* subject was owner of the brig. The referees were fully satisfied that *Robert Mackie* owned her, and that he was a subject of *Great Britain*, born in *Scotland*, from his broad *Scots* dialect, which could not well be mistaken, his intimate knowledge of the local state of that kingdom, and his letter of introduction as a *Scotsman* to his countryman. This was strong presumptive proof of the domicile of the party for whose use the policy was subscribed, and it lay on the underwriters to repel it by other proof. It appeared also, that when the vessel was shipwrecked, she had on board a *British* licence and clearance. The referees thought, that the evidence fully ascertained the truth of the words in the policy, that she was a "*British* brig," in their sense of the expressions.

As to seaworthiness, there is no doubt that every vessel insured must, at the time of the insurance, be able to perform the voyage, unless some external accident should happen, otherwise the underwriters are discharged from their responsibility. But here no proof has been given of any latent defect in the brig, known or unknown to the insured. Considerable repairs were made upon her before the voyage began. Several masters of ships embarked on board of her, shewing thereby their strong sense of her seaworthiness; and her being thrown on a ridge of rocks, fully accounts for her loss. Of this the referees were the competent judges as a matter of fact, and they have expressed their entire satisfaction that the brig was seaworthy, before she sailed the second time from the *Havana*.

Upon the whole, I do not think that these referees, who have for some years past been actively engaged in the business of insurance, have erred in such a manner either in law or fact, as should induce the court to interpose, and am therefore of opinion that the report should be confirmed.

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BRACKENRIDGE J. In applying my mind to consider this report, I am led to examine to what extent, under the head of *approving a report*, the court will inquire into the ground of fact, or law, on which the report has been made. For, though I have become reconciled to the extent to which, *in practice*, the courts have gone, in examining reports of referees, yet I never have been satisfied, and am not now satisfied, with the principles, which have been laid down, in governing that practice. For these would seem to warrant a practice beyond what has been exercised. The decision in *Williams v. Craig*, 1 Dall. 314, made a considerable noise in this state at the time it was determined; and I will acknowledge, that, notwithstanding my high respect for the legal abilities of the then Chief Justice, I could not perfectly acquiesce in the whole extent of the principles laid down by him on that occasion: viz. "that the same cause which would induce us to set aside a verdict, and grant a new trial, should be sufficient for vacating an award. In the one case the decision is made by twelve men upon oath, with all the information which the judges and learned counsel can communicate. In the other, it is the act of persons, who are not sworn to the faithful discharge of their duty, and who are unassisted, either in ascertaining the law, or, in developing the fact, upon which the question submitted to them may depend; which abundantly shews, that the sacredness of awards ought not to be extended beyond that of verdicts, and must justify the court in putting them upon the same footing, when errors are suggested either in clear points of law or fact.

To this doctrine I can by no means subscribe; for, it is the court, or some one, or more of them, before whom the cause was tried, that are to judge on a motion for a new trial, whether the verdict is against evidence; whereas in examining a report of referees, the facts of the case are out of the knowledge of the court, or any of them; and this forms a reason why the court cannot, with so much advantage, examine a report of referees, in order to approve, and why the court cannot go so minutely into the evidence, in the case of a report, as in the case of a verdict.

But it has been said by the Chief Justice, in the case to which we have referred, that our act of assembly of 1705, is

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 "than those known in England. This act provides, that
 MACKIE "where the plaintiff and defendant consent to a rule of court
 v. "for referring to certain persons mutually chosen &c. the
 PLEASANTS. "award &c. being made according to the submission of the
 "parties, and *approved* of by the court &c., shall have the
 "same effect, and be as available in law, as a verdict of
 "twelve men."

This act may have had a reference to the laws agreed upon in *England* some years before, by which it was provided, "that all trials shall be by twelve men;" and which provision might be supposed to exclude the settlement of controversies by referees; and, it might be necessary therefore, to give the courts power, under rules of court, to refer matters and give judgment on awards, as on the verdict of twelve men. But it is sufficient to account for the provision, that it became necessary, or was at least salutary, in order to give effect to an award; and it is in this view of the case that I consider it as departing from the law of *England*; not as introducing a *new species of awards*, but as giving a *new remedy on awards*; that is, giving them to be considered as a verdict, in order to support a judgment and execution. For before such provision, the remedy could be, but by an action on the award, or an attachment from the court.

It never could be meant to narrow the effect of a report, by giving it the force of a verdict; and it would be narrowing it, to restrain the province of referees to that of a jury in giving a verdict. On the contrary, I take it, no change is made in the law of *England* in this particular; but the superintendence of our courts over a report remains precisely the same as under the jurisprudence of that country; taking the superintendence of the courts of law, and that of chancery together. For under the head of *approving*, there being no court of chancery with us, our courts are warranted by that act, in going the same lengths, as the courts of law, and courts of chancery in *England*. And I take it this was the view of this act, and the reason of the provision, the *approving* by the court. When we have ascertained therefore how far a court of law, and court of chancery will go, in examining into the grounds of a report, we shall have precedent to guide us, in considering what shall justify the setting aside

a report here. For passing over the setting aside a report for misbehaviour of the parties or referees, or from what appears upon the face of the report, which have been always grounds of setting aside even in courts of law, under the head of *approving* we undertake to inquire into the grounds of the report, not as we consider ourselves bound to do in the case of a verdict, but as done in the court of Chancery in *England*. The extent is laid down in that case to which I have alluded, viz. that "in the case of a clear error in point of law, or fact, the court will interfere." This language has never been to me perfectly satisfactory. What application is there ever made to set aside a reference, where it is not insisted on the one side, that the error is plain, and, on the other, that there is no error at all. But the language of the Court of Chancery is not in these unqualified terms. That court is delicate in calling on referees to lay before the court the reasons and grounds of their award. "A bill will not lie to compel the arbitrator to discover the grounds on which he made his award," and for this I refer to *Kyd on Awards* under this head. "It is unreasonable that he should be put to so much trouble and expense. If there be any palpable mistake made by the arbitrator, or a miscalculation in an account that had been laid before him, the party aggrieved may bring his bill against the party in whose favour the award is made, to have it rectified." *Kyd on Awards* 332. "A material mistake in point of fact, an erroneous statement of an account, even a plain mistake in point of law, coupled with other circumstances, are grounds for an examination in a court of equity, from the result of which the award may be partially affected, in a greater or a less degree, and sometimes wholly set aside. Thus, though a court of equity, where the only object of the bill is to set aside an award, will not permit the plaintiff to discuss legal objections to it, but will confine him to those for partiality and corruption, yet, if the bill, beside praying to set aside the award, pray also for an account, he will be permitted to make legal objections, in order to let in such an account. If indeed the arbitrators appear to be mistaken in a doubtful point of law, the award may be permitted to stand, though the court after great deliberation, should be of a different opinion. And, in a late case, where no law-

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“yer could doubt upon the point of law, this distinction was laid down by the court of King’s Bench; that where the arbitrators, meaning to follow the law in their determination, happen to mistake it, this is a good reason for setting aside their award, so far as it is affected by that mistake. But where, knowing what the law is, or laying it intirely out of their consideration, they make what they conceive, under all the circumstances of the case, to be an equitable decision, it is no objection to the award, that in some particular point it is *manifestly against law*.” *Kyd on Awards* 350. For this reason the award was confirmed, although the arbitrators stated “that they did not conceive they were awarding on the point according to any fixed rules of law, but doing what appeared to them, under all the circumstances of the case, strict and impartial justice.” *Kyd* 354. In the case of the *South Sea Company v. Bumstead*, Lord Talbot said that “arbitrators were in the nature of judges, and in some respects had a greater latitude, not being confined within the rules of a court of law, or equity; and therefore might make such allowance, as could not be admitted in a court of judicature.” *Kyd* 356. From these citations, which have been made by the author of this tract, and which I have made from him, it will be remarked that the language of the Court of Chancery, in the superintendence which it exercises in the examination of reports of referees, is that of an *evident mistake* of the referees. It is not *error*, which is a term in legal language that embraces more. For that, in strictness of legal acceptation, may be *error* in point of law, which is not *mistake*, as is laid down in the late decision to which he refers. For a great advantage of a reference oftentimes is, *to escape the application of a general rule to the particular case*; whether on the ground of admitting evidence of the fact, or, in applying the law to the fact. It would seem to be in a great measure, a matter of discretion, and with much greater latitude than in granting a new trial in case of a verdict, where and to what extent a court will interfere in setting aside the report of referees.

In the case before us, is there a warranty, that the brig insured was a *British* brig?

There is an *express*, and an *implied* warranty; in other words, a warranty in deed, and a warranty in law. A war-

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ranty in law must be wholly a matter of law, because it is the law that raises it. A warranty in deed, or *de facto*, cannot be matter of law, unless where words are used to which the law has affixed, by decisions, a legal meaning, so that it ceases to be a matter of construction, whether within the intention of the parties, a warranty exists. Now, it does not seem to me that decisions have been produced so perfectly in point, and of such direct bearing, as to have fixed the construction of the words so used, so as to preclude all consideration of intention. On the contrary, I think it remains clearly a matter of construction depending on intention; and that the meaning, and extent of the terms, is to be collected from all parts of the policy taken together, and even from *extrinsic circumstances*. And, I take it, evidence of the usage of such terms is admissible in explanation of the extent of them. The manner in which the words are introduced, strikes me as indicative of the laying too little stress upon them by the parties, to construe them a warranty. It cannot reasonably be supposed, and ought not to be supposed, that the insurer, expecting a warranty of such extent, would rest satisfied with having it so loosely and uncertainly expressed. It is his own fault not to have had it clear of all ambiguity; and on the principle that the instrument shall be construed most favourably for the assured, in a doubtful case, and to me this is at least doubtful, I incline for the assured.

Nor is it clear to me that these words can be construed even a representation. On the contrary, it seems to be a case where as much may be said, and perhaps, with as much appearance of good reason, on the one side as the other. If a representation, whether it be *material*, or otherwise, is a question not clear of all difficulty. I do not think it was meant to be considered as material; otherwise we should have had it unequivocally expressed to be. Such looseness and uncertainty are not to be favoured. Let underwriters look to the instrument, which they sign; and if they expect a warranty in a case where the law will not imply it, let the stipulation be such that there can be no doubt about it. The circumstance of these words, *the British brig*, not being where a warranty is professed to be made as to other matters, but coupled merely with the designation of the vessel, and the name *John*, I incline to take it as the referees have

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done, to be matter of description merely; and in that case we are clear of all authorities and reasoning, on the subject of warranty or representation. I think the referees were justified in construing this instrument, from the juxta-position of the words, from the usage of introducing matter of description in that manner, not meaning to give it the effect of a warranty or a representation, and from the understanding of merchants. Be that as it may, I am not so clear in it that I will undertake, as at present advised, to say, that they were not justifiable in taking this latitude. That being the case, I will not meddle with the conclusion they have drawn, that it was not a warranty, or a representation. The circumstance of the risk insured against, weighs much; *the perils of the sea*. It does not necessarily force itself upon the mind, that the circumstance of *British built* was a consideration in the insurance, as lessening the risk; nor of being *British owned*. The possible contingencies of being in a better state, from being less liable to be suspected of having violated the embargo, and so, less likely to be questioned, and the continuance of the risk at sea less likely to be protracted, are remote considerations, which it does not seem to me can be presumed to have been in the minds of the insurer, so as to have had in view the circumstance of *being British*, as a *substantial part of the contract*. If so, it became him to have had it more explicitly stated, and not to leave it to be inferred by implication. Were a direction to be given to a jury, I do not see that I could take it from them as a matter of fact, whether a warranty, or whether a matter of material representation, made a part of the contract in this case. Much less, where it is a reference to merchants, and it may be fairly presumed, for the express purpose of having an investigation upon liberal principles, would I undertake to set aside what they have done.

The second exception appears to me to have a question of more substantial difficulty in it. For laying out of the law, the circumstance of being condemned a short time before as *unseaworthy*, inasmuch as it is alleged, and the referees may have been justified in concluding from what they had before them, that this was but to manage the procuring a sale, in order to acquire the denomination of a *British* vessel, yet, the springing a leak and two foot water in the hold immediately after sailing, is

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evidence violently presumptive that the vessel was not seaworthy at the time of sailing; and, at which time, the policy attached. Suppose it owing to the stowage, and first lading of even a new vessel, that a leak springs immediately, or in a very short time. Can that vessel be said to be seaworthy? It is strongly presumptive that she was not; and I do not see how a jury could get over it. But if just after weighing, she is discovered to be deficient, and is unloaded, and then repaired, is the insurer discharged? Sailing a short distance would not seem to make a substantial difference from just weighing, and setting sail; and yet if we admit that the policy may notwithstanding have attached, to what distance may we allow her to have sailed, and within what time may we consider her probation as continuing? It is possible that the referees in this case may have considered the first sailing, and the second, as one sailing; and I am not clear that they may not have been justifiable in so considering it. It certainly would have been advisable to have given notice to the underwriters, that they might have had it in their power to say whether they would consider the policy as void, or as still existing. That not having been done, but taken for granted on the part of the assured, that it did continue, the strict consideration will be, whether the vessel was seaworthy at the first sailing; or whether the second sailing was all the same sailing, and to be considered as the first. Did it appear to me from the examination of the referees, that they had the point precisely under their consideration as to seaworthiness at the time of the first sailing, and had presumed that she was seaworthy, and passed upon the question, this being purely matter of fact, I certainly should not think myself justifiable in overthrowing their conclusion. But I am not clear that they did confine their views to this point precisely. At the same time I am not clear, that they were not justifiable in considering the vessel as still in port until she did put back; and that the policy may be considered as attaching at the time of the second sailing. There is a nicety in this which might deserve consideration. But I incline to think from examination of the referees, that they confined themselves to the state of the vessel at the time of the first sailing; and however difficult it might be for me to believe that she could be in a seaworthy condition, yet I

1810. should not think myself bound to differ from them; and
 unless bound, by a strong sense of the injustice done, I
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 PLEASANTS. Award confirmed

Philadelphia,
 Monday,
 March 26.

MILLER and others assignees of JOHN PINKERTON,
 a bankrupt, against ORD executor of ORD.

Where the principal assigns a fund to trustees to pay a creditor whom the surety afterwards pays, and the proceeds of the fund are then paid over by the trustees, the surety is entitled to the benefit of the fund, and may recover it from the person who possesses it, in an action for money had and received in his own name.

INDEBITATUS assumpsit for money had and received by the defendant, for the use of the plaintiffs as assignees.

Upon the trial of this cause before the Chief Justice, at the Nisi Prius preceding the present term, the following facts were in evidence.

In the year 1797 *David Pinkerton* was imprisoned for a debt due to the *United States*. *Andrew Kennedy*, and the house of *Jones and Clark*, came forward to assist him, and issued each a note for 1172 dollars 77 cents, which was applied to his relief, and was afterwards paid and taken up by the drawer. *Kennedy* had received a promise of indemnity from *John Pinkerton*, the father of *David*, before he issued the note. *David Pinkerton*, who had a vessel and cargo ready for sea at the time of his imprisonment, conveyed the vessel to *Jones and Clark*, and the cargo to *Jones and Clark and Kennedy*, in trust that the proceeds should be applied, in the first place to repay the amount of the notes, and of some other debts due from him to *Jones and Clark and Kennedy*, and the surplus, if any, to be returned to him. The vessel and cargo were sent to sea, insurance having been effected by *Jones and Clark* who conducted the business. They were both lost on the homeward voyage. The underwriters refused payment, and the money was recovered of them in April 1803. In the mean time, in July 1802, *John Pinkerton* had satisfied *Kennedy* for the note drawn by him, according to his engagement. In November 1802, *John Pinkerton* became a bankrupt. Very soon after the money came to the hands of *Jones and Clark*, they paid *Kennedy* the amount of his demand against *David Pinkerton*, exclusive of

the note which had been satisfied by *John*, and retaining in their hands, the amount of their own claim, they paid the surplus to *George Ord* the administrator of *David Pinkerton*, who was then dead. In a few days after *Ord* had received the money, the plaintiffs demanded it of him as belonging to the estate of the bankrupt, and upon his refusal to pay, this action was brought. *Ord* died during the pendency of the suit, and the defendant was substituted as his executor.

On the trial, it was contended, that if the plaintiffs were entitled to the money, the suit should have been brought in the name of *Andrew Kennedy* for their use; and this point was reserved by the Chief Justice. The jury found for the plaintiffs.

Hare and Condy for the plaintiffs. The action could not be brought in *Kennedy's* name for various reasons. First, because *Kennedy* had not even a legal right to the fund, as his debt was satisfied, and the surplus paid over with his knowledge to *Ord*. As to him the trust was extinguished. Secondly, because we do not claim under him, or as assignees of the contract made with him; but in our own right, as being equitably entitled to the fund, which our payment as surety has liberated. Again, because in an action by *Kennedy*, the recovery must be upon his case, and not upon our own; and as we have no assignment or transfer from him, the recovery would not enure to our use. That we are entitled to sue in our own name, will be seen by examining how we are entitled. *Ord*, not as administrator, because his intestate had no title, but as a stranger, received a fund destined for the payment of *Kennedy*, which fund was released by *John Pinkerton's* payment as surety. *John Pinkerton* had previously become bankrupt, and his assignees stood in his place. We are as surety, entitled to the benefit of all the securities which the principal has given. *Parsons v. Bridgock (a)*, *Ex parte Rushbrook (b)*, 1 *Eq. Abr.* 93. Not by virtue of the contract between the principal and creditor, but by our own equity, and the implied contract between the principal and us. If we had a court of Chancery, surely we might have a bill in equity; and an action for money had

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(a) 2 *Vern.* 608.(b) 10 *Ves. jr.* 422.

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and received, is in the nature of a bill, and should be liberally extended. It is the very form of action to reach a fund, out of which we are entitled to be paid. If *David Pinkerton* had received the fund, it would in equity have been money received to our use. It is the same with *Ord*. We are the equitable *cestuy que trust* of the fund; and we are therefore the only persons who can bring the action, and this is the only form. It was upon this principle that the indorsee of a bill drawn to a fictitious payee, recovered in money had and received against the acceptor. *Tatlock v. Harris* (a). He was entitled to the fund. To the same effect is *Fenner v. Mears* (b). In many cases, to avoid the inconvenience of the rule that a chose in action cannot be assigned, this form of action has been supported in the name of the party having the equitable interest. *Israel v. Douglass* (c). We are however clear of the doctrine of choses in action. If we had wanted an assignment of the trust deed, equity would not have decreed it, because, as we could not sue upon it, it would be useless. *Gammon v. Stone* (d), *Woffington v. Sparks* (e). We stand in the situation of a surety who has paid the bond of his principal. He cannot sue in the name of the obligee, but he has his action against the principal for money paid, or money had and received to get possession of the fund which is his security.

Dallas for the defendant. There are two objections to the plaintiffs' recovering. First, because *John Pinkerton* was the voluntary surety of *David*, without the request, or the knowledge of the latter; and no action at all lies by the surety in such a case. He has no equity, since no man has a right to make himself the creditor of another, against the other's will. Secondly, because to enforce an equitable claim upon securities, the party, when he goes into chancery, must set out all his case upon the bill, and when he goes into a court of law, he must state his derivative title upon the declaration; that is, he must bring an action on the case. The form of action is intimately connected with the merits. A bill in equity would apprize the defendant of the whole of the plaintiffs' case; the common law form should be made to do the same. There

(a) 3 D. & E. 174.

(c) 1 H. Bl. 242.

(e) 2 Ves. 569.

(b) 2 W. Black. 1269.

(d) 1 Ves. 389.

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would be otherwise inevitable surprise, and all forms of action would coalesce. There can be no doubt that the plaintiffs must claim under the assignment, because they can claim in no other way. *John Pinkerton* could not have sued *David*, because he was not asked to become his surety. The assignees of *John* are in no better situation. The only chance they have, is by taking *Kennedy's* place under the assignment, and then most certainly they must, as the assignees of a chose in action, sue in his name. It is true that a surety has a right to the creditor's security; but *Kennedy* was himself the surety of *David*, and there is no instance in which the surety of a surety is entitled to the surety's security. At least he can have it in no way, but by an implied assignment, and then he must use the name of his assignor. If the fund had been set apart expressly for *John Pinkerton's* use, or if the property had been assigned to *Kennedy* or his order, the plaintiffs might possibly sue in their own name. But that is not the case. They claim derivatively the benefit of a chose in action, and this should appear upon the record. Nothing but this precaution will prevent the plaintiffs from suing the representative of *David Pinkerton* a second time, to recover the money as having been paid for his use. All the cases cited, turned upon a positive contract by the holder of the fund to pay to the plaintiff as assignee, and therefore money had and received would lie. Here there was no contract whatever with the plaintiffs; they stand as the representatives of the assignee.

In reply it was said, that the right of the plaintiffs to recover, was no part of the point reserved. That was settled by the jury. The only question was as to the necessity of using *Kennedy's* name.

TILGHRMAN C. J. after stating the facts, delivered the court's opinion.

The argument in this court has taken a wider range than the point reserved, and reasons have been urged to shew, that on the general merits of the case, the plaintiffs are not entitled to the money. Although this point, in strictness, is not open, yet the court have no hesitation in declaring their opinion, that *John Pinkerton*, having paid the amount of

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the note drawn by *Andrew Kennedy*, was entitled in equity to stand in *Kennedy's* place, and have the same relief from the fund pledged for the payment of that note, as *Kennedy* himself might have had. This principle is highly reasonable, and sufficiently established by the cases cited by the plaintiffs' counsel. Let us consider then what objection can be made to the form of action. It is said that a chose in action is not assignable, and that the suit should have been in the name of *Andrew Kennedy*. But this action is by no means founded on the assignment of a chose in action. It is not founded on the deed by which *David Pinkerton* conveyed the vessel and cargo to *Jones* and *Clark* and *Andrew Kennedy*, but on an original right vested in *John Pinkerton*, in consequence of his having taken up a note for which this cargo was pledged. It bears no resemblance to an action by the assignee of a bond, where the cause of action is founded solely on the bond. Besides, to put the matter out of all doubt, if the action cannot be supported in the name of the plaintiffs, it cannot be supported at all; for in the name of *Kennedy* no action will lie. He has no claim on this fund, having already received full payment of all his demand, and the surplus was paid over by his consent. Another objection was, that this action was too general, and gave the defendant no notice of the plaintiffs' real claim, and therefore he should have brought a special action on the case. But this objection has no more weight in the present instance, than in a thousand others, in which this kind of action has been allowed to be well brought. It is an objection to the form of action in general, which in its nature is not calculated to give special notice of the plaintiffs' claim. But to remedy this inconvenience, the court will take care to protect the defendant from surprise. He may call on the plaintiff to specify the nature of his demand, and until that is done, the trial will be postponed. By this precaution, we are enabled to preserve a form of action, well calculated for the recovery of *equitable* demands, without injury to the defendant; and in this state, where there is no court of chancery, we are bound to encourage those forms of action by which equity may be attained.

On the whole, the court are of opinion that the plaintiffs' action is well supported by the evidence.

Judgment for plaintiffs.

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The Lessee of HUSTON against HAMILTON.

Philadelphia,
Monday,
March 26.

PATRICK MOORE and *Hannah* his wife were seised in fee of the premises in right of the wife, on the 13th of *June* 1786. On that day they conveyed the same (*inter al'*) to *Robert M'Clenachan*, by indenture, in consideration of ten shillings, reciting as follows:

"Whereas it is intended by the said *P. M.* and *H.* his wife, to convey all and singular &c. unto the said *Robert M'Clenachan*, his heirs and assigns, in trust for the use of the said *P. M.* and *H.* his wife, for and during the term of their joint lives; and in case of the death of the said *P.* before the said *H.* his wife, then in trust for the use of the said *H.*, her heirs and assigns for ever; and in case of the death of the said *H.* before the said *P.* leaving issue, then in trust for the use of the said *P.* during his natural life, and after his death in trust for the use of such child or children of them the said *P.* and *H.* his wife, as shall be living at the time of the death of the said *P.*, his, her or their heirs and assigns for ever; but in case of the death of the said *H.* before the said *P.* without issue, then in trust for the use of the said *Patrick Moore*, his heirs and assigns for ever." Then followed the grant to *M'Clenachan*, *habendum* in fee, upon the following trusts: "In trust nevertheless to and for the use of the said *P. M.* and *H.* his wife and their assigns, for and during the term of their joint lives; and from and after the determination of that estate, if it shall happen by the death of the said *P.* before the said *H.* his wife, [to the use of the said *Robert M'Clenachan*, his heirs and assigns, for and during the joint lives of the said *P. M.* and *H.* his wife, upon trust only to preserve the contingent uses and estates therein after limited from being destroyed, and to make entries for the same if needful; and from and immediately after the death of the said *P. M.*, in case the said *P.* shall die before the said *H.*,] then in trust to and for the use and behoof of the said *H.* her heirs and assigns for ever. But in case such estate shall determine by the death of the said *H.* before the said *P.*

Husband and wife conveyed the estate of the wife in trust for their use during their joint lives, and in case of the determination of the joint estate for life by the death of the wife before the husband without issue, then for the use of the husband in fee. Held that the issue must be understood in its natural sense of a dying without issue living at the death of the wife; and the wife having left a child who survived her a few days and then died before the husband, he did not take a fee.

When an estate is conveyed in trust to serve certain uses, a resulting trust arises by implication of law to the grantor, for all such parts of the equitable estate, as are not disposed of by the deed.

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" *leaving issue*, then in trust to the use of the said *P.* and his assigns, for and during *the term of his natural life*, without impeachment of waste; and from and after the death of the said *P.*, to the use and behoof of *such child or children* of them the said *P.* and *H.* his wife, *as shall be living at the time of the death* of the said *P.*, his, her or their heirs and assigns for ever. BUT IN CASE OF THE DETERMINATION OF THE JOINT ESTATE FOR LIFE of them the said *P.* and *H.* his wife, herein before limited, by the death of the said *H.* before the said *P.* WITHOUT ISSUE, then in trust for the use and behoof of the said *P.* his heirs and assigns for ever. And to and for no other use" &c.

Hannah Moore the wife died in *September 1786* before her husband, leaving issue one child, who died about thirteen days after her. *Patrick Moore* the husband died in *August 1803*. The lessor of the plaintiff was heir at law to *Hannah Moore*, and to her child.

The trustee *Robert M'Clenachan* conveyed to *Patrick Moore* in fee, on the *10th November 1796*, all the estates granted to him by the deed from *Moore* and wife; and the defendant, with full notice of the claim by the heir at law, bought the premises at sheriff's sale, under an execution against *Patrick Moore*, and held them under a deed from the sheriff of the *1st of February 1798*.

Upon these facts a verdict was taken for the plaintiff at the *Nisi Prius* preceding this term, with liberty to the defendant to move for a new trial. The principal question was, whether *Patrick Moore* took a fee, or only a life estate, under the circumstances that had happened.

Tilghman and *Lewis* in behalf of the motion. *Patrick Moore* took a fee. The deed of 1786 must be interpreted liberally. Conveyances by way of use are always construed like wills with respect to the intention of the parties; and when a court of law or equity finds that the general and substantial intent of the parties was that the estate should pass, they will support that intent by a construction, which the formal nature of the instrument does not in other cases admit. *Stapelton v. Stapelton (a)*, *Leigh v. Brace (b)*. They

(a) 1 Atk. 2.

(b) Carth. 343.

will even construe them against the words, for the sake of the intent. *Kentish v. Newman* (a). The intention here was to give Mrs. Moore a fee if she survived her husband; if she died leaving the husband and a child, and that child survived the husband, he was to take for life, and the child a remainder in fee; but if the husband survived the child, he was to take the fee. This as it respects the husband was the very end of the settlement; for upon the birth of a child he would take a life estate, independent of the deed. The whole deed shews this intention. The recital of the uses, expresses a design to give the husband a fee upon the death of his wife before him *without issue*; which in its genuine legal sense, does not mean a failure of issue at her death, but a failure any time during the life of *Patrick Moore*. It is otherwise sometimes as to legacies; but there is no instance in which a dying without issue as to limitations of real estate, is confined to issue living at the first taker's death, without declaration plain. *Nichols v. Hooper* (b). Here the declaration is the other way; for as the child took nothing but upon surviving the father, *without issue* meant issue that should survive him, and none other. The trusts, it is true, differ from the recital; but they are in some respects absurdly drawn, and the variation was probably a mistake. The recital is the key to the intention. By a liberal construction however, both may be reconciled. The husband's fee depends in the trust clause, upon the determination of the joint estate for life, by the wife's dying before the husband without issue. All these words must be taken in connexion to ascertain the meaning; 5 Ves. jr. 247; and the court, to support the intention, will say, that when the issue died before *Patrick Moore*, then Mrs. Moore died without issue, and the joint estate was determined by her death without issue. If this was not the meaning, why not give the fee absolutely to the child that should be left by Mrs. Moore? It is the only construction that can be supported, because it was clearly the intention to give the husband a fee if he survived the child. The variation between *leaving issue*, and *without issue*, is also material. If issue was left at the death of the wife, then the use was to *Patrick* for life, and to the issue in fee if it survived

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(a) 1 P. Wms. 234.

(b) 1 P. Wms. 199.

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him; but if the issue died before *Patrick*, then *Mrs. Moore* died *without issue*, and he took the fee. To give the last words the same meaning as the first, the court must read them "without *leaving issue*," or "without *such issue*;" and they will not do that, to make the existence of a child for ten days, deprive the husband of the fee.

Dallas and *Ingersoll* contra. There is no doubt that a conveyance under the statute of uses is to be construed liberally, according to the intention of the parties; but as the uses were in this case carved out of the wife's estate, an intention will be presumed in favour of the wife's heir at law, unless the instrument provides for his exclusion. There was no intention to give *Patrick Moore* a fee, except in one case, that of *Mrs. Moore's* dying before him without issue living at the time of her death. This case has not happened. The recital shews no intention to the contrary. When a life estate is designed for the husband, the recital speaks of *Mrs. Moore's* leaving issue. When a fee is intended, then it speaks of dying without issue; which must be understood in its common sense, that is, not leaving issue, because it stands in opposition to the case of leaving issue. The event in which he was to get a life estate, has actually occurred; she died leaving issue; and there is not a syllable in the deed to shew, that any event occurring after the death of the wife, was to alter the estate of the husband as it existed at that time. But the decisive objection to his taking a fee, is that all the dispositions in his favour take effect *upon the determination of the joint estate for life* by *Mrs. Moore's* death, and at no other time. When therefore the dying without issue is coupled with that event, it is declaration plain that the failure of issue is limited to the death of the wife; and that if issue was then in being, the limitation of the fee to the husband, was not to take effect. To give him a fee in the event that has happened, is to make the joint estate of the husband and wife subsist after the death of the wife, and until the death of the issue, though it might be fifty years. Where was the equitable reversion in fee during the child's life? It certainly was in the child; for otherwise, though the child had lived fifty years and left issue, if *Patrick* had survived, he would have taken the fee from the issue, which was never the

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intent; and if it was in the child, there is nothing in the deed to take it out of him in favour of any body. The difficulty in the case does not arise out of the language of the deed, but from the happening of a circumstance which the parties did not anticipate, namely, the leaving issue, and its dying before the father. Of course no provision is made for the case. But the consequence of the omission is not that the father takes the fee, but that it goes to the heir at law; and he is entitled to recover against the defendant, notwithstanding the defendant has the legal estate in him, by the conveyance of *M^cGlenachan* to *Moore*, and the transfer of *Moore's* estate by the sheriff.

Lewis, in reply, suggested that if, according to the plaintiff's argument, all the equitable estates, except *Patrick Moore's* life estate, had expired upon the death of the child, both the legal and equitable estate were from that time in *Robert M^cGlenachan*, to whom the whole had been conveyed to serve only particular uses; and that by his conveyance *Patrick Moore's* estate was enlarged to a fee. But at a subsequent day, *Mr. Lewis* said he would not press the point.

TILGHMAN C. J. In this case two questions arise. 1st. Did *Patrick Moore* take an estate for life or in fee simple, under the trust deed from himself and his wife to *Robert M^cGlenachan*, his wife having died before him, leaving issue a child which also died before him? 2d. If he took but an estate for life, was his estate strengthened or enlarged by the deed to him from *Robert M^cGlenachan*?

1. It is agreed that the trust deed is to be construed liberally, so as best to effectuate the intent of the parties. The question is, what was that intent? It is evident that after giving the estate to the husband and wife for their joint lives, there was a design to provide for the moment when the marriage should be dissolved by the death of either of them. If the wife survived, she was to take the fee-simple. If she died first and left issue, the husband was to have an estate for his life; but if no issue, then in fee. As to the children, inasmuch as the father was to hold the estate during his life, nothing was to vest in them until his death; and then the estate was to vest in such children as should be at that time

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living, as joint-tenants in fee. This is the main intent of the parties; and it seems to me, that we are perplexed, not with any difficulty in the construction of the deed, arising out of the expressions contained in it, but by an event not foreseen, and therefore not intended to be provided for; I mean, the death of the infant a few days after the death of the mother. It seems hard, that so short a life should deprive the husband of a fee simple; and we cannot help asking ourselves, if this could have been intended. But it is dangerous to indulge such reflections, because they lead us from the fair construction of the deed as it is written, which is the only thing we have a right to consider. To return to the deed then. It first provides, that in case the joint estate for life shall determine by the death of the wife, *leaving issue*, then the husband shall take for life. Thus far it is plain beyond doubt, that if there was issue at the time of the wife's death, the husband was to have no more than an estate for life. Next follows a provision for the issue; after which it is said, "but in case of the *termination of the joint estate* for life of them the said *Patrick Moore and Hannah* his wife, herein before limited, "by the death of the said *Hannah* before the said *Patrick* "without issue, then in trust for the said *Patrick Moore*, his "heirs and assigns" &c. The case here provided for, is the determination of the *joint* estate by the wife's death without issue. Now the *joint* estate was determined at the instant of the wife's death; and consequently that is the point of time, to which the dying without issue relates. And this is in exact conformity with the former expressions of the wife's death *leaving issue*, and makes the whole deed consistent.

But we are asked by the defendant's counsel, to strain the construction of these words *dying without issue*, and to understand by them a death leaving issue, which should die in the life of the father. I say, to strain the construction; because, if we adopt this sense, we must reject those words which confine the dying without issue, to the time when the joint estate is determined. Besides, although in point of law, *Mrs. Moore* may be said to have died without issue before her husband, notwithstanding she in fact left issue at the time of her death, yet that is not the most obvious meaning of those expressions. It is a construction introduced for the purpose of preventing the general intent of an instrument of

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writing from being defeated, and was first resorted to from necessity. Now here is no such necessity. If the husband takes but an estate for life, the remainder goes where, unless there is a clear intent to the contrary, it ought to go, to the heirs of the wife to whom the estate belonged. This is a case, in which it is proper to give those words, *dying without issue*, their natural meaning. I am therefore of opinion, that in the event which has happened, the husband took an estate for life and no more.

2. The second point was founded on an idea, that even supposing that *Patrick Moore* took but an estate for life, yet he obtained an indefeasible estate in fee by the conveyance of *Robert McClenachan* the trustee, who it was supposed took not only the whole legal estate by virtue of the trust deed, but also all that part of the equitable estate, which was not disposed of by the deed. This point has, upon reflection, been very candidly abandoned by the counsel for the defendant. It certainly was not tenable. It was the manifest intention of the parties, that the trustee should take no beneficial interest by this deed. The consideration of ten shillings was merely nominal, and inserted for no other purpose than to raise an use, by which the legal estate might be vested in the trustee. This being the case, a resulting trust arose by implication of law, for the benefit of *Mrs. Moore*, to whom the property belonged, for all such part of the equitable estate, as was not disposed of by the deed. It follows, that the lessor of the plaintiff, who is the heir both of *Mrs. Moore* and her child, is entitled to call on the defendant for a conveyance of the legal estate. I am therefore of opinion that the motion for a new trial should be denied, and that judgment should be entered for the plaintiff.

YEATES J. of the same opinion.

BRACKENRIDGE J. of the same opinion.

Motion denied, and
 Judgment for plaintiff.

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Philadelphia,
Monday,
March 26th.

ARMROYD against The Union Insurance Company.

To make a survey and condemnation for unsoundness &c., a bar within the usual memorandum, it must appear that the vessel was condemned for unsoundness or rottenness only. If the survey states injuries by storm as well as by decay, and concludes that the surveyors are therefore of opinion that the vessel is unworthy of repair and unfit for sea, and the decree of the admiralty is founded upon the report generally, such a survey and condemnation are not a bar.

THIS was an action on a policy of insurance dated the 28th of September 1803, upon the brig *Fair American*, valued at 5000 dollars, at and from Philadelphia to Barbadoes &c. The policy contained the following printed clause: "If the above vessel after a regular survey should be condemned for being unsound or rotten, the assurers shall not be bound to pay their subscriptions on this policy."

The cause was tried before the Chief Justice at Nisi Prius in February last, in conjunction with a suit upon a policy on goods by the same vessel; and in each case the single question was seaworthiness.

The brig sailed from Philadelphia on the 3d of September 1803, and put back in consequence of a small leak. Her cargo was taken out, and she received repairs to a very considerable amount, the carpenter's bill alone being 254*l*. She sailed again on the 26th; and on the 1st, 6th, and 24th of October, she experienced violent gales, in the last of which she was laid on her beam ends, when the crew were obliged to cut away the mainmast and rigging, and to discharge the deck load, in order to save their lives. In consequence of this weather, the brig was so much strained as to leak excessively, having seldom less than five feet water in the hold; and it was with great difficulty that she made *St. John's* in the island of *Antigua*, on the 11th of November. On the day after her arrival, the captain petitioned the court of admiralty for a warrant of survey, which was granted on the same day, directed to two merchants, two ship masters, and two shipwrights in the usual form; and on the first of December, the surveyors returned the following report:

"In obedience to the foregoing warrant of survey, we whose names are hereunto subscribed, being all of the persons to whom the same is directed, did on the twelfth day of November last repair on board the said brig *Fair American*, whereof *Lambert Whillden* was master, then lying at anchor in the harbour of *St. John* in this island *Antigua*, and having had the brig pumped entirely dry, we waited fifteen

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“minutes, at the expiration of which time we sounded, and
 “found that she had made six inches of water. That upon
 “diligently viewing searching and examining into her state
 “and condition, we found that her mainmast had been cut
 “away five or six feet from the deck; that a timber head, and
 “two quarter deck stanchions on the starboard side, had
 “been carried away; that the starboard pump was split by
 “the falling of the mast; that the boat on the stern was stove;
 “that the back part of the rudder was loose; that the main
 “hatch was well secured, and the barrels in the hatchway
 “were quite dry; and from the report of the said *Lambert*
 “*Whilden*, the deck load had been thrown overboard. That
 “from the quantity of water which she had, and did then
 “make, we were induced to believe the cargo had received
 “considerable damage; we therefore recommended that part
 “of the cargo should be discharged, in order that we might
 “take a further view of the vessel and cargo. That by *the*
 “*fourteenth day of the same month of November* past, part of
 “the cargo was accordingly discharged, and we again re-
 “paired on board the said brig *Fair American*, and upon
 “inspecting the cargo, we found a great many of the barrels
 “and half-barrels very much damaged by the sea-water.
 “We therefore directed the whole of the cargo to be landed,
 “so that it may be carefully examined, to enable us to as-
 “certain what further steps would be most eligible to be
 “taken for the benefit of the parties interested. That on *the*
 “*twenty-fourth of the same month of November*, we again
 “repaired on board the said brig *Fair American*; and having
 “ordered the ceiling to be taken off about the lower futtock-
 “head, where the middle and lower futtocks met, *from the*
 “*main chains aft we found the timbers quite decayed. That*
 “*the upper breasthook and wing transom was in the same*
 “*decayed state.* That the trunnels were started in many
 “places, and generally very loose and rotten; and that the
 “ceiling throughout was *decayed and loose.* We THEREFORE
 “were of opinion, that the said brig *Fair American* was un-
 “worthy of repair, and unfit for sea, and that it would be
 “most to the advantage of the parties concerned, that she
 “should be forthwith sold at public auction.”

On the same day that the report was returned, the judge of vice-admiralty, “upon reading the petition &c. the judge’s

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"warrant in pursuance thereof, and the report or return of the surveyors, &c., and also upon hearing the arguments of his majesty's advocate general, of counsel with the said Lambert Whillden, was pleased to order, adjudge, and decree, that the said brig *Fair American*, her tackle, apparel, and furniture, be sold by the marshal of this court, and that the proceeds thereof, after paying all costs and charges, be paid into the hands of the said Lambert Whillden, &c.;" and she was accordingly broke up, and sold.

Much evidence was given upon the trial to shew that the brig was seaworthy when she left *Philadelphia*; but however that evidence might affect the policy on goods, it was contended by the defendant's counsel, that the survey and condemnation were conclusive evidence of unseaworthiness, and under the memorandum, a bar to the plaintiff's recovery upon the policy on vessel.

Upon this point *Tilghman C. J.* charged the jury as follows.

I am called on to give my opinion on the construction of the memorandum, and of the survey and condemnation in this case. It is a contract which bears hard on the assured, especially in long voyages; but being the agreement of the parties, and not being contrary to law, no court has a right to say that it is void. It is to receive a fair construction; but not to be extended beyond the plain meaning of the words. If there is a regular survey and condemnation for unsoundness or rottenness, the assurers are discharged. When I say unsoundness, I mean, as the law was decided in the case of *Garrigues v. Coxe*, an unsoundness arising from decay, and not from accidental injury. But then the unsoundness or rottenness must be the sole cause of condemnation. If the condemnation is grounded partly on rottenness, and partly on damage sustained by violence of storms &c., the case is not within the contract. In the present instance, the survey and condemnation are regular in point of form. There was a petition to the judge by the captain, a warrant of survey, a report of the surveyors, and a decree founded thereon. It is not necessary that the judge should make use of the word *condemn*, in cases of this kind. It is enough, if upon the whole matter he orders a sale of the vessel. There is no occasion to

decide whether in all cases, there must be a *decree* of a judge. Surveys may sometimes be made in places where there is no court. But on this I give no opinion. In this case there was a decree. It is contended by the defendants' counsel, that the record shews a condemnation for rottenness. The opinion of the surveyors he supposes is founded on that cause only, and the decree of the judge is founded on the opinion of the surveyors. The report shews that the surveyors made two examinations. On the first they viewed the state of the vessel with the cargo on board, and they mention the loss of the mainmast, and other material injuries, sustained by the violence of winds and seas, and not by the decay of timber. The last examination was after the cargo was taken out, and the inside timbers exposed to view, by ripping off some of the planks of the vessel. Marks of considerable decay were observed, and are particularly mentioned. The report then concludes, "*we therefore* were of opinion that the said brig was unworthy of repair, and unfit for sea, and that it would be most to the advantage of the parties concerned, that she should be forthwith sold at public auction." But is this conclusion drawn from the facts respecting *rottenness*, *immediately preceding* it? I am of opinion that it is *not*, but from the whole matter stated in the report. The loss of the mainmast &c. were facts extremely material in deciding whether it was for the benefit of the concerned to sell the vessel. They would have been injured by repairs, which might cost more than the vessel would be worth when repaired. It appears to me therefore, to be an unreasonable and forced construction, to confine the conclusion of the surveyors to the facts respecting the rottenness of particular timbers. But let us now consider the decree, which is a very material part of the record. The condemnation is by the *judge only*. It is said that after hearing the *report*, and the arguments of counsel, he ordered a sale. But what pretence is there for supposing, that the decree is founded upon one part of the report more than another, when the judge assigns no particular cause. If the loss of the mainmast &c. was an important consideration, why should we suppose that the judge paid no regard to it? I cannot bring myself to consider it in that light. Upon every principle of fair construction, it appears to me that the

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decree is founded on the *whole collection* of facts reported by the surveyors. I am therefore of opinion, that the plaintiff is not barred by the survey and condemnation given in evidence.

The Chief Justice then said, that the case resulted to the single point, whether upon the evidence, the vessel was seaworthy at the commencement of the voyage; and he expressed the inclination of his mind that she was. After the charge, the counsel for the defendants gave notice, that to have the question under the memorandum finally settled, he should move it in bank upon a motion for a new trial; and the jury found for the plaintiff in both actions.

A motion for a new trial was accordingly made; and it was now argued by *Dallas* for the defendants, and by *Gibson* and *Tilghman* for the plaintiff.

For the defendants. The clause was introduced at the instance and for the benefit of the underwriter, to get rid of the necessity of proving that the unsoundness or rottenness of the vessel, existed at the commencement of the risk. It should therefore be liberally construed for his protection. The contract is not a hard one in general, because in a voyage of medium length, the unsoundness established by the survey, must by necessary implication be referred to the outset of the voyage; it is certainly not hard in such a voyage as the present. It never was intended by the parties, that if, at the same time that the survey found unsoundness in the hull, it noticed the loss of masts &c. by storm, this should take the case out of the clause; for it would elude the clause in every case, where the vessel had lost a spar upon the voyage, as it is notoriously the practice in all surveys, to state minutely the superficial losses and defects. It is finding rottenness in the hull, that brings the clause into operation; and unless the other matters are expressly connected with the unsoundness, and specified as the cause of condemnation, the bar is complete. There has been no decision upon the memorandum that can govern this case. In *The Marine Insurance Company v. Wilson* (a), the report did not mention unsoundness or rottenness, and the defects referred to, were

(a) 3 Granch. 187.

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limited to a time subsequent to the commencement of the voyage. In *Garrigues v. Coxe* (a) the condemnation was founded exclusively upon the damage done by rats. In *Watson v. The Insurance Company of North America* (b), the reason assigned for condemnation was in part the want of materials and mechanics, and that the repairs would cost more than the vessel would be worth. Then how is the survey in the present case? The first visit produces a narrative of none but accidental losses. The surveyors draw no conclusion from it. Their attention was from the first directed to the leak, which was not produced by any thing then observed. To ascertain it they ordered a partial, and then a complete discharge of the cargo. On the third visit they come to the hull. The timbers, the upper breasthook, and wing transom are *decayed*, the trunnels are started and *rotten*, the ceiling is started and *decayed*; and then without connecting the loss of mast, &c. with these facts, they say we are *therefore* of opinion that the brig is *unworthy of repair*, and unfit for sea. *Therefore* relates to the next antecedent, the decay and rottenness; it lies upon the plaintiff to shew that the loss of the mast was a part of the consideration. *Unworthy of repair* implies that repairs could be gotten, but that the brig was too rotten to deserve them. There is nothing about want of materials or skill, or the cost of repairs. Decay is expressly assigned as the reason, and nothing else; and the court cannot go out of the report. When the judge ordered a sale, he adopted the conclusion of the surveyors.

For the plaintiff. The construction of the clause is not to be affected by its being introduced by the insurer; if it is at all doubtful, the turn of the scale should be in favour of the assured. *Cowp.* 148. 1 *Burr.* 349. But all that is required, is a fair construction. It is certainly a hard clause in long voyages, and is not beneficial to the assured in any case, because the survey does not conclude the underwriters. In this case the jury have found the vessel to have been seaworthy when she left *Philadelphia*; of course the defendants must rest exclusively upon the clause, and they must therefore bring themselves in every respect within it. The case of

(a) 1 *Binn.* 592.(b) *Cir. C. U. S. Penn. dist.*

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Garrigue v. Cox settles the construction, that if the survey shew unsoundness from decay only, then the clause bars; but if the whole survey taken together shew injury by accident as well as by decay, it does not bar. A mixed reason for the condemnation, takes the case out of the clause. *Watson v. Insurance Company of North America*. The surveyors may recite sea damage to the upper works, and also find unsoundness in the hull. The mere recital of sea damage does not destroy the effect of the clause; because the surveyors may ground the condemnation upon unsoundness only. But unless they do, how is it possible for the court to say, which had the most effect upon the condemnation? Before the clause can bar, the surveyors must pin their conclusion to unsoundness alone. Here the opinion is founded upon all the surveyors had seen. "*Therefore*" comprehends the whole that goes before. But if it did not, the decree of the judge does. A condemnation is clearly necessary where there is a court, though it may be otherwise where there is none; and this condemnation, which is therefore essential, is not founded upon this or that remark of the surveyors, but upon the report, that is, the whole. It is impossible to say that the repair of the injuries done by storms, did not enter into the calculation of the surveyors. They would have made the most important items of expence; and the very terms used, shew that they may have been included. They find the brig unworthy of repair, not unseaworthy; and every vessel may be unworthy of repair, even when sound, from the great cost of repairs. It is sufficient for us, that it does not appear that the brig was condemned solely on account of unsoundness or rottenness.

YEATES J. after stating the report and decree, delivered his opinion as follows:

It has been contended by the defendants' counsel, that this survey, which I have detailed somewhat at large, forms a complete bar to the plaintiff's recovery; and unless it be so construed, it defeats the object of the company in inserting the clause in question;—that the conclusion of the surveyors, immediately after the word *therefore*, is necessarily founded on what they had seen in their last visit, the decay of timbers, breasthook, trunnels and ceiling; and that the finding of the

brig to be *unworthy of repair*, and *unfit for sea*, having reference to the last antecedent, substantially asserted, that she was *unsound* and *rotten*, within the true meaning of the policy. Another cause on a policy on goods on board the brig, wherein a clause of like import was not introduced, having been tried at the same time, with the present action, precluded the defendant's counsel from bringing the naked question before the court, by taking an exception to the evidence of sea worthiness, offered on the part of the plaintiff.

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Unquestionably, courts of justice are bound to construe all contracts, according to the true intent and meaning of the parties, and to execute them accordingly. Where technical expressions are not used, the words are to be taken in their plain and obvious sense, and not to be strained on either side.

It has been said, on the part of the plaintiff, that in order to render the survey an estoppel to the plaintiff's recovery, it must clearly appear, that there was a condemnation by the judge, on the ground, that the vessel was *unsound* and *rotten*; while it was admitted, that the necessity thereof would be superseded in a country, where there was no legal tribunal to make such adjudication. The difficulty, as I take it, does not occur in the present instance. The judge on reading the captain's petition, his own warrant, and the return of the surveyors, and hearing the arguments of counsel, was pleased to order &c. He judged *de et super premissis*; and if the report of the surveyors brought the case within the true meaning of the words of the policy, he, by adopting their conclusion, may be fairly said to agree therewith.

The real question is, whether the surveyors have established in their report, that the vessel was *unsound* or *rotten*, when the voyage commenced? It is perfectly clear, that *general* unsoundness could not be caused in a voyage of six weeks; but it is equally clear, that there may be a *partial* unsoundness in particular timbers, which could not with propriety destroy the character of a vessel as seaworthy. The ship-carpenters testified on the trial, that scarcely a single vessel sails on the ocean, without having some unsoundness in part of her timbers; and hence it is evident, that in the view of persons conversant in the structure of marine vessels, they

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cannot be denominated unsound, or unseaworthy, merely because individual constituent parts of their hulls are in a state of decay. It requires an assemblage of such defects, to ascribe justly to them the appellation of being unseaworthy. We must recur to the language of the report, to ascertain what the surveyors have found.

They were thrice on board the brig, to execute the trust reposed in them. In their first visit, they ascertained the extent of her leakage in a given period of time, while the cargo was on board, and the devastation and effects produced by the rage of the elements which she had encountered:—in their second visit they examined the damaged state of the cargo:—in their third and last visit, when her cargo was unladen, they examined the particular parts of her internal structure, as I have already enumerated. Here I may observe, that it was proved on the trial, that some error must have crept into the phraseology of the report, respecting the middle and lower futtocks *meeting*, which does not occur in shipbuilding. Examining the whole of this return with attention, can we with safety pronounce, that the conclusion of the surveyors, or the decree of the judge, was grounded on the single fact of the brig being unsound or rotten? Is it not more natural to suppose, that the effects of the storm, and the difficulty, if not the impracticability, of procuring materials for refitting her for sea, as well as the decay of her timbers, formed a capital consideration, in the result of their several decisions? My mind is strongly inclined to the latter opinion; and if I am correct herein, it brings the case before us, within the precise principle established by judge *Washington*, in *Watson and Hudson v. The Insurance Company of North America*, as to a mixed cause of condemnation, on a clause in a policy of similar import to the present; and also by the unanimous opinion of this court in *Garrigues v. Coxe*, upon a motion for a new trial in *March term 1809. 1 Binn. 592.*

Upon the whole matter, I am satisfied, that the present motion should be denied.

BRACKENRIDGE J. The question in this case depends upon the clause in the policy, "if the above vessel, after a regular survey, should be condemned for being unsound or rotten."

If this were to be considered as merely evidence, which goes to the question of seaworthiness at the attaching of the policy, it must go to the jury, coupled with other testimony in the case to bear upon the question of seaworthiness. But it would seem to be the intention of the parties, that this of itself should be the evidence, and be conclusive on the fact of a want of seaworthiness. It is an agreement that this should be assumed as conclusive evidence of the fact. Not but that a want of seaworthiness might be proved independent of this; but that if such evidence should exist, it should supersede farther investigation, and be of itself conclusive. The difficulty of proving a want of seaworthiness, which is in its nature negative, seems to have given rise to the clause. It is for the benefit of the insurer, and amounts to an agreement that this shall conclude. Taking it in this view, it ought to appear clearly and unequivocally, that the condemnation was upon this ground. But would it not be carrying it too far, to say, that it must be expressed unequivocally in so many words, and in direct terms, that the condemnation was on this ground? It would be restricting it to the exactness of special pleading, to say, that though it substantially appears that this was the cause, yet that not having said so in express terms, it cannot bar. It would seem reasonable, however, that it should appear, it was not the *principal* cause, or *a* cause, but *the* cause of condemnation; and I take it, that it will be sufficient if a sale is recommended for this cause, though it is not said, that the vessel is condemned for that cause only.

In the case of *Watson and Hudson v. The Insurance Company of North America*, the report of the surveyors was, that many of the timbers mentioned were found to be unsound and rotten, and that in the shattered and stranded situation of the vessel, and the want of proper mechanics *there*, for repairing her, the repairs *would cost more* than the vessel was worth; and they recommended that she should be sold, and an order of sale was given on this report. By judge *Washington* in this cause, there was not thought sufficient found to bar, on the construction of this clause. I should have thought so too; though strong evidence to the jury of a want of seaworthiness at the outfit, left the question still open to the insurer.

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In this case the report goes much further, and would seem to me to state the unsoundness and rottenness as *the sole ground of the condemnation*. On the 12th of *November* the surveyors had the brig pumped dry. In fifteen minutes she made six inches water. They found that the mainmast had been cut away five or six feet from the deck, that a timber head, and two quarter deck stanchions on the starboard side had been carried away, and they recommended that a part of the cargo should be discharged, in order to take a farther view of the vessel and cargo. As to matter of unsoundness or rottenness, there had been yet no examination, not having come to the hull of the vessel, which must be the subject of examination, with a view to this matter. On the 14th of *November*, a part of the cargo having been discharged, they repaired on board, and upon inspecting the cargo, they found many of the barrels and half barrels much damaged by the sea water, and directed the whole cargo to be landed, so that it might be carefully examined, to enable them to ascertain what farther steps would be most eligible to be taken for the benefit of the parties interested. All this is but preparatory to the examination as to the soundness or unsoundness of the vessel; there is nothing that respects soundness or unsoundness in the parts examined.

On the 24th of *November*, they come to examine the vessel with a view to this, or at least the examination respects this. "Having ordered the ceiling to be taken off, about the lower futtock head where the middle and lower futtocks met, from the main chains aft, we found the timbers quite decayed; that the upper breasthook and wing transom was in the same decayed state; that the trunnels were started in many places, and generally very loose and rotten, and that the ceiling throughout was decayed and loose. We therefore were of opinion that the said brig *Fair American* was unworthy of repair, and unfit for sea; and that it would be most to the advantage of the parties concerned, that she should be forthwith sold at public auction."

To say whether the word "*therefore*" shall refer to the defects ascertained on the examination of the 24th, or shall relate to the defects ascertained on the examinations of the 12th and 14th also, ought not to be made a question of grammatical reference merely; for in that case I do not see how it could be restrained to the examination of the 24th,

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and not extend to all that preceded. But it must be restrained or extended by what follows. It seems to me to be restrained by the words "unworthy of repair." What was unworthy of repair? The hull of the vessel. She had not such a body as was worth repairing; and that, by reason of unsoundness and rottenness. Repairs must respect chiefly the damaged parts, or deficient parts, apparent on the examination of the 12th or 14th. The unworthiness and unfitness for sea, that which had been discovered on the examination of the 24th. The want of timber or mechanics to make the repairs of mast &c. is not stated, as in the case of *Watson v. The Insurance Company of North America*, as making any ground for which the sale is recommended; nor is the matter of cost, as in that case, hinted at; but that the body of the vessel did not deserve any repairs that might be made. Unless therefore, we were to go so far as to say, that the report, or condemnation, or both, must in terms quadrate with the clause in the policy, and that it must be stated expressly that she is unsound and rotten, and for that reason condemned, and that not the facts only on which the sale is thought advisable, must be stated, but the conclusion drawn, I must think that the report in this cause satisfies the clause in the policy. I cannot suppose it to have been in the intention of the parties, to require on the one side, or to expect on the other, such conclusion in so many words to be drawn; but only that sufficient should be set forth to warrant a court and jury in drawing the conclusion from the facts, and the substance of the cause of sale or condemnation. I am of opinion therefore that a court on demurrer, or a jury under the direction of a court, would be bound to consider the evidence of this survey as a bar to the demand of the plaintiff; and that where, from a statement of facts in a report specially made, the court and jury cannot but infer that the vessel was *unsound and rotten*, and that for that reason she was not worth repairing as to other defects, her situation is brought within the clause. I think therefore, there ought to be a new trial.

TILGHMAN C. J. said he adhered to the opinion he expressed upon the trial, and therefore concurred with Judge Yates that the motion ought to be denied.

Motion denied, and
Judgment for plaintiff.

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Philadelphia,
Saturday,
March 31.

HAVARD against DAVIS.

IN ERROR.

ERROR to the Common Pleas of *Chester* county.

A will in writing of lands may be revoked by the parol republication of a former will in writing. And in order to ascertain whether the republished will operates as a revocation, the contents may be proved by parol, if the will itself cannot be found, and the usual ground is laid for introducing the secondary evidence.

This was an issue directed by the Register's Court, to try whether a certain paper writing, dated the 19th of *September* 1806, was the last will and testament of *Samuel Havard*, or not. The defendant in error, who was plaintiff below, was a principal devisee in this will.

Upon the trial of the issue, the will in question, which contained in it a clause revoking all former wills, was proved by the oath of *John Davis* one of the subscribing witnesses; the signature of *Benjamin Torbert* the other witness, who died before the trial, was proved by three witnesses; and two witnesses swore that they believed the body of the will to be in the testator's handwriting. It was also proved, that on the *Thursday* preceding his death, the testator again acknowledged this paper as his last will, in the presence of *John Davis*; *William Davis* the executor named in it, and *John Havard Davis* his son the plaintiff, and delivered it into the possession of the executor, with a request that in case he died, no time should be lost in getting it proved, as there would be many disappointments.

The testator died on *Saturday* the 19th of *November* 1806, about eighty years old.

On the part of the defendant below, *Sarah Havard*, the sister of the testator, deposed, that about two weeks before his death, *B. Havard* the defendant came to his house, and that the testator spoke to him the following words: "*Benjamin*, I have made several wills. They are in my desk. "But the last will that I made, *Ezekiel Potts*, *Billy Potts*, "and *Tommy Jones* are witnesses to. Get that one proved;" or "let that one be proved." "If thee wants any assistance "in settling my affairs, get *John Jacobs*; don't let *Bill Davis* "go among my papers, or he'll slip them bonds out that I "have against him." She also deposed, that the day before the testator's death, he forbid her sending the plaintiff to his desk, lest he should slip out the 400*l.* bond he had against

his father; and that in the summer preceding he had declared that the plaintiff should have no "holding" on the lands, and that the place should be the defendant's; that it should not go out of the name.

John Jacobs deposed, that in the middle of *August* 1806, he was at the testator's house, and was requested by him to look over his papers. The testator told him that there was a bond which he could not see, and which he expected was amongst them; that he had been looking for it a few days before. The witness picked up a paper lying folded upon two others, opened it, cast his eyes to the bottom, and asked the testator whether he always kept a will by him. The testator asked who were the witnesses to that will, and then went on, "are they *Ezekiel Potts, Billy Potts, and Tommy Jones?*" "Yes," said the witness, "they are." The testator then took the paper out of the witness's hands, looked at it and said "*This is my last will.*" That will was dated in 1806. On *Sunday* morning before the testator's death, he requested the witness to go up stairs to his desk, and in a certain drawer he would find a bond against *Billy Davis*. The witness went up, and saw the same will lying, in the same form, upon two other papers. He took it up, and read it. The two *Potts's* and *Jones* were the witnesses. On *Wednesday* the testator asked him whether he had seen his will, the day when he sent him up for *William Davis's* bond. He replied that he had seen two or three wills. "Did thee see the "one witnessed by *Ezekiel Potts, Billy Potts, and Tommy Jones, made about two years ago?*" The witness told him he had. "*That is my last will*" he said, and requested the witness to help the defendant settle his affairs. The witness knew that after this, the testator was not able to get out of his bed; and he saw the testator's papers generally in the possession of *William Davis*, the executor in the will of *September*, the day but one after the testator's funeral.

Ezekiel Potts, William Potts, and Thomas Jones, deposed, that in *August* 1806 they subscribed their names as witnesses to a paper, which *Samuel Havard* signed in their presence, and declared to be his last will and testament.

The defendant having proved a notice to the plaintiff, to his counsel, and to *William Davis*, to produce the will of *August*, then offered the said *John Jacobs* as a witness to

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prove the contents of that will. But this evidence was objected to, and overruled by the court.

He then offered the same witness "to prove the declarations of *Samuel Hayard*, (the testator) made shortly before "and shortly after the date of the said paper writing read to "the jury, (the will of *September*,) and the paper writing said "to be executed in *August* 1806, for the purpose of shewing "the intention of the said *Samuel Hayard* to dispose of his "estate differently from what is done by the said paper "writing read to the jury, and for the purpose of shewing "that he had made no such writing as that read to the jury." This was also objected to, and overruled by the court, who sealed a bill of exceptions upon both points. The jury found for the plaintiff.

The exceptions were argued at *December* term 1809 by *T. Ross* and *Ingersoll* for the plaintiff in error, and by *Hemphill* and *Tilghman* for the defendant in error.

For the plaintiff in error. 1. The contents of the will of *August* should have been received in evidence upon two grounds. First, because there was sufficient proof of its being in existence at the testator's death, and of its having come to the hands of *William Davis*. Secondly, to shew a revocation of the will of *September*, by proving that the will of *August*, which had been republished, was contrary to it.

First. If a will continue in writing at the time of the testator's death, though it be lost or burnt afterwards, it stands good. *Lawrence v. Kete* (a). But to know to what purpose it is good, the contents must be proved. It may be good to establish a presumption of fraud, in obtaining a contrary will a month afterwards. If the will had been in our possession, no doubt we might have produced it; and the rule of evidence is universal, that where the writing itself would be evidence, its contents may be proved, if the original is lost, or is in the hands of the opposite party, and notice has been given to produce it. *Peake* *Ev.* 97. *Gilb. Ev.* 96. *Cole v. Gibson* (b), *Med. Acot v. Joyner* (c), *Read v. Brookman* (d), *The King v. Cul-*

(a) *Aleyn*. 54. (b) 1 *Ves.* 505. (c) 1 *Med.* 4. (d) 3 *D. & E.* 151.

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pepper (a). 12 *Vin.* 233. *pl.* 13. In this case especially the evidence should have been received, because there was strong presumption that the executor of the other will, the father of the principal devisee, had gotten possession of the will of *August*, and if it had not made against him, would have produced it. 1 *Ld. Ray.* 731. Where the heir at law suppresses a will, chancery will decree the devisee to hold, until the will is produced. *Hampden v. Hampden (b)*. But what the devise, or who the devisee is, cannot be known without proof of the contents.

Secondly. The republication of a former will revokes a contrary will of later date; and to shew the contrariety, the contents of the republished will, if lost, may be proved. Here was a valid republication of the will of *August*, the testator having declared it to be his last will in the presence of *John Jacobs*, and *Sarah Hayard*, long after the will of *September*. By the law of *Pennsylvania*, a declaration by the testator to two witnesses that the paper writing is his will, is sufficient, though they do not subscribe their names as witnesses; the same act therefore will amount to a republication. Republications are greatly favoured. If a man devises certain lands, and then aliens, and repurchases, and afterwards shews his intention that the said will shall be his last will, this is a new publication, and the lands shall pass. 7 *Bac. Abr.* 320. Parol declarations have been held to republish a will of lands in *England* even since the statute of frauds. *Hall v. Dunch (c)*. If the testator says his will is in a box in his study, this is a new publication. *Cotton v. Cotton* cited in *Alford v. Earle (d)*. Can such a republication then, revoke a will in writing in this state? We contend it may. The 6th section of the act of 1705, 1 *St. Laws* 55, directs that “no will in writing, concerning any goods or chattels or personal estate, shall be repealed, nor shall any clause, devise or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the lifetime of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by two or more wit-

(a) *Sinn.* 673.(c) 1 *Vern.* 330.(b) 1 *P. Wms.* 733.(d) 2 *Vern.* 209.

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"nesses." Admitting that this extends to lands, an original will in writing, without the signature of witnesses, without any thing but the parol declaration of the testator that it is his last will, would clearly revoke a different prior will. If a former will is republished with the same solemnities that would make an original will, it does not differ in any respect from an original will; it therefore in like manner amounts to a revocation. The statute of frauds as to revocations has a different effect. By the 6th section, no devise can be revoked but in one of three ways: by burning, cancelling &c., by a writing of revocation, or by some other will. If it is by some other will, this, according to *Ecclestone v. Pelly* (a) must be a good will under the statute, that is, it must be attested and subscribed in the testator's presence by three or four witnesses; and therefore a republication to produce a revocation, must be executed in the same way. *Pow. on Dev.* 630. But the same rule of construction applied to our law, gives a different result; that is, a republication of a will in writing by parol may revoke a will, because a will in writing published by parol may do it. Unless however the contents of the republished will are known, it cannot be said that they are a revocation. To produce this effect it must be a different will; and it is a question for the jury to say, upon the evidence of the contents, whether different or not. The case of *Goodright v. Harwood* (b) shews plainly that the contents should have gone to the jury with this view, for if there is no difference, there is no revocation.

2. The declarations were admissible in three points of view, to shew fraud, to prove a republication, and to give the testator's meaning at the time of executing his will. There was a strong suspicion of fraud on the testator's mind, as to the executor in the will of *September*. The 400*l.* bond, and the disappearance of the will of *August*, which the testator could not have destroyed, and which probably went with the other papers, were a sufficient ground for the evidence. To shew that a later will was obtained by fraud, parol evidence may be given, that the testator at the time of signing it, asked if it was the same as a former will, and was answered in the affirmative. *Small v. Allen*. (c) That they might have

(a) *Carth* 79.(b) 3 *Wils.* 497.(c) 8 *D. & E.* 147.

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proved a republication, is clear from the arguments already urged. They should however at all events have been admitted upon the principle of *Hurst v. Kirkbride*, cited in *Wallace v. Baker*. (a) They were declarations shortly after and shortly before, which includes the time up to the very moment of execution. The declarations of a testator after an unsuccessful attempt to tear and burn his will, may be proved to shew that he meant to destroy it; *Bibb v. Thomas* (b), *Pow. on Dev.* 635; and similar declarations were admitted in *Boudinot v. Bradford* (c), and in *Lawson v. Morrison* (a).

For the defendant in error. The will of *September* was completely proved; it contained a clause revoking all former wills; and it subsisted at the death of the testator. The evidence offered, was in the first place to prove the contents of a will not shewn to be in existence at his death, and which had been expressly revoked; and in the next place by parol declarations to revoke a will in writing. It was properly rejected in both instances.

1. As to the contents. There was no evidence whatever that the will of *August* existed at the testator's death; at least it was thought insufficient by the court to ground the secondary evidence; and it is the court that is to judge in the first instance, whether due proof of such existence and loss has been given, to justify the admission of inferior evidence. 3 *Bl. Comm.* 368. What the jury might have inferred from the evidence, is therefore of no importance in this point of view, because the evidence was not for the jury. The court must have adopted the presumption in *Lawson v. Morrison*, that the testator himself had destroyed the will, and that it was not in existence at his death. Now there is no instance where there has been a later subsisting will, and at the same time evidence has been admitted of the contents of a former will, not proved to have been in existence after the testator's death. It is otherwise with deeds and writings which have effect in the life of the party; but until the testator's death a will is nothing, and if it does not exist at that time, of course it is not evidence. The case of *Lawrence v. Kete* is in our

(a) 1 *Binn.* 616.(c) 2 *Dall.* 267.(b) 2 *W. Black.* 1043.(d) 2 *Dall.* 289.

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favour; proof of the contents is there confined to wills subsisting after the testator's death. But the evidence is said to have been admissible, because there was proof of a republication, and it went to shew a revocation of the will of *September*. This however cannot be, for it would constitute a revocation by parol. Undoubtedly, implied revocations may be proved by parol; for they are a consequence of law arising from some fact, and not from a declaration. But that is not the present case. The revocation is not pretended to arise from any fact, but from the declarations of the testator, of which there is no written evidence whatever. The act of assembly is express that there shall be no revocation by word of mouth only; from which it necessarily results that a republication by word of mouth only, cannot amount to a revocation. The case of *Hall v. Dunch* was decided upon a will before the statute; and it has been overruled, it having been since held, that the devising clause in the statute puts an end to all parol republications, as the revoking clause does to all parol revocations. *Pow. on Dev.* 665. *Bunker v. Cooke* (a), *Cave v. Holford*, in a note to *Williams v. Owen* (b), *Barnes v. Crowe* (c). Since that statute, a republication must be in writing; *Acherley v. Vernon* (d), *Bunter v. Coke* (e), *Hawe v. Burton* (f). If a republication by parol be good under the act of assembly, then after purchased lands will pass, and there will thus be a will of lands by parol. It is impossible to permit a parol republication to revoke a written will, without eluding the act of assembly altogether. It stands upon the same ground as the statute. The republication must have all the solemnities of an original will, or it will not answer. But it is essential to an original will that there be writing. It is true the signing of witnesses is not requisite; but writing of some kind to be witnessed, is. The republication therefore should be evidenced by writing. It is a fallacy to say that the will is the writing; because the execution of the will is not the matter in controversy; it is the republication that is to be proved, and of that there is no written evidence. It is not the will of *August* that revokes the will of *September*; it is the republication of that will, which is by word of mouth only.

(a) *Fitzgib.* 229.

(b) 2 *Ves. jr.* 606.

(c) 1 *Ves. jr.* 495.

(d) 9 *Mod.* 78.

(e) 1 *Salk.* 238.

(f) 8 *Vin.* 164. *pl.* 116.

2. As to the declarations. If they went to prove a revocation of the will of *September* in any way whatever, they were inadmissible, because they were parol. They might be admitted upon a question of sanity, but no such question was raised in this case. The declarations of a testator before and after making a will, are the most dangerous of all kinds of evidence. To preserve the peace of families, dispositions by will are frequently misrepresented; and the protection of testators in their old age many times depends upon it. To make them even competent evidence, the least that can be demanded, is that they should have been made *at the time of* executing the will, and should go to prove fraud, after a proper ground was laid for admitting them for that purpose. So was *Small v. Allen*. But the declarations of the testator even on his death bed, are not competent to shew that he had before executed his will under duress. *Jackson v. Kniffen (a)*. It would not only set up parol evidence to destroy a written will, but would open a door to the grossest perjury. It is moreover not enough to cry fraud; it should be distinctly alleged, and there should be at least a colour for the charge. The bill of exceptions says nothing about fraud. The evidence was not proposed to shew it. It is an afterthought; for there was not a tittle of evidence that the will of *August* had come to the hands of *Davis*, or that any deception had been practised upon the testator. Considering the testator as a witness, the general rule of law is against admitting his declarations, and they fall within none of the exceptions. *Peake Ev. 7. Brown v. Selwyn (b), Ulrich v. Litchfield (c), M'Nally 174, The King v. The Inhabitants of Eriswall (d)*. Considering them as explaining his own act, they can never be admitted except when made at the time, and then only to support an allegation of fraud.

Cur. adv. vult.

TILGHMAN C. J. The points which arise in this cause are stated in the bill of exceptions. It was an issue from the Register's Court, to try the validity of a writing exhibited as the last will and testament of *Samuel Havard* deceased,

(a) 2 Johns. 31.

(b) *Cas. Temp. Talb.* 240.

(c) 2 Atk. 373.

(d) 7 D. & E. 719.

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dated 19th *September* 1806. The plaintiff below, *John H. Davis*, in support of the will, examined the subscribing witnesses and others. The defendant then examined witnesses, who proved that the testator made another will dated — *August* 1806; that this will was in existence a few days before the death of the testator; and that subsequent to the making of the will of *September*, the testator had declared to several persons, that the will of *August* was his last will, and the one which he wished to be proved after his death. The defendant then offered *John Jacobs* as a witness, to prove the contents of the will of *August*; but his testimony was rejected by the court, and the defendant's counsel excepted to their opinion.

The object of the defendant, was to shew that the will of *August* was contrary to the will of *September* 1806, and to destroy the validity of the latter, by proving a parol republication of the former. The question is whether a will in writing can be thus revoked?

By the act of 1705, sect. 1, lands may be devised by "a will in writing, proved by two or more credible witnesses." But it is not necessary that the witnesses should subscribe their names; nor is it even necessary in all cases, that they should see the execution of the will. If it is in the handwriting of the testator, it may be proved by any two persons who know the handwriting. By the 6th section of the same act, "no will in writing shall be repealed, nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the lifetime of the testator committed to writing, and after the writing thereof read to the testator, and allowed by him, and proved to be so done by two or more witnesses;" that is to say, a will in writing shall not be revoked, but by a will in writing, or by words of the testator, reduced to writing before his death, and read to him. But there is no intimation, that it is necessary for the witnesses to subscribe their names, or that any greater ceremony or solemnity, should be necessary to prove a will which revokes a former will in writing, than would be required to prove an original will. A will in writing, republished after its execution, has all the effect of an original will from the time of republication. It will pass lands, purchased by the testator

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between the first execution and the republication. Why then shall it not amount to a revocation of a second will, made subsequent to the execution of the first, but before its republication? Cases were cited on the argument, by the counsel for the defendant in error, to shew that in *England* since the statute of frauds, a will in writing could not be revoked by a parol republication of a former will. But a little attention to the statute of frauds will shew, that these cases are not applicable to the present question. It is enacted by that statute, "that no devise in writing of lands, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling &c.; but all devises of land shall remain in force, until the same be burnt, cancelled &c., or unless the same be altered by some other will or codicil in *writing*, or *other writing* of the devisor, signed in the presence of three or four witnesses declaring the same." The statute is expressed in very clear terms, and the construction has been, that a will may be revoked in two ways; 1st, by a subsequent will executed with all the forms necessary to an original will devising land, viz. it must be signed by the testator, and attested by three witnesses, whose names are to be subscribed in the presence of the testator; or 2dly, a revocation may be by a simple writing of revocation, by which no lands are devised, signed by the testator in the presence of three or more witnesses, who in that case need not subscribe their names *in his presence*. To have any bearing on the present case, it should be shewn, that, before the statute of frauds, a revocation of a will in writing could not have been made by a parol republication of a former will. No such authority has been produced. On the contrary, it was said by Lord Chief Baron *Eyre* in *Barnes v. Crowe*, 1 *Ves. jun.* 497, that "before the statute, it was no part of the essence of the obligation, that the will should be re-executed. Any thing that expressed the testator's intention, that the will should be considered as of a subsequent date, was sufficient." Now if a parol republication had the effect of making the republished will operate from the date of the republication, it must necessarily have amounted to a revocation of any former will making a different devise of the same land. If the devises were the same, there would be no revocation, but rather a confirmation. But this shews the necessity of proving the contents of the republished will.

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Unless the contents are known, it cannot be said to whom the land will pass. It has been argued however, that in the case before the court, no parol proof should have been admitted of the contents of the will of *August* 1806, because it was not expressly proved that the will was in existence at the death of the testator; and that the court, and not the jury, had the right of judging whether sufficient proof had been given of such existence. In answer to this argument, it is to be remarked, that the court, before the testimony of *Jacobs* was offered, had permitted evidence to be given to the jury, of the existence of the will of *August* a few days before the testator's death, and other evidence tending to shew that he never cancelled it; and notice had been given to the executor of the will of *September* 1806, and to those persons who had the possession of the papers of the testator in general, to produce the will of *August*. Under these circumstances it should have been left to the jury to decide, whether the will of *August* was republished, and in existence at the death of the testator; or if not in existence, whether it had not been improperly destroyed, without his knowledge; for in the latter case it would have been sufficient, though not in existence, to destroy the validity of the will of *September*. On this point, the case of *Rolfe's Lessee v. Harwood*, 3 *Wils.* 479, is very strong. The testator made a will devising land in 1748. He made another will in 1756, duly executed. The jury found, that the disposition of the land by the will of 1756, was *different* from that of the will of 1748, but in *what was unknown* to them. They did not find that the testator cancelled the will of 1756, or that it was destroyed by the person claiming under the will of 1748, but what was become of the same they knew not. On this finding, the heir at law of the testator had judgment to recover the land. The devise by the will of 1748 was revoked by a contrary devise in the will of 1756; but inasmuch as it did not appear what the devise of 1756 was, nothing passed by it, and the land descended to the heir. It is true, this judgment was reversed by the Court of King's Bench, and the judgment of reversal affirmed in the House of Lords, as appears in 2 *Black. Rep.* 937. But whoever reads the argument of Sir *Wm. Blackstone*, (in 3 *Wilson*) who dissented from the opinion of the Court of Common Pleas, will be satisfied that

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the judgment was reversed, because the jury did not find in what the contents of the second will differed from the first; on the contrary they did not know the contents, and therefore it could not appear to the court that the two wills were different. But Sir *Wm. Blackstone* does not seem to have entertained any idea of its being improper to offer parol proof to the jury, of the contents of the will. On principles then, which may be drawn from the argument of Sir *Wm. Blackstone*, the jury would have been justified in finding against the validity of the will of *Samuel Havard*, made in *September 1806*, although the will of *August* was not in existence at the time of his death, provided they were convinced that the will of *August* was different from it, and could say in what that difference consisted, and that the will of *August* was republished subsequent to the will of *September*; and provided they were also convinced, that the testator never revoked the will of *August* after such republication. But in order to know whether the two wills were different, the jury should have been permitted to know the contents of both; and under the circumstances of the case, the defendant below never having had possession of the will of *August*, and having called on those persons to produce it, in whose hands it was most likely to be, I think parol testimony should have been admitted. I give no intimation of my opinion as to the strength of the evidence of a republication, produced by the defendant. It is sufficient that there was evidence, of which the jury were to judge. But this I will say, that nothing but very clear and strong evidence should induce a jury to set up a will which had been once revoked, and of the republication of which there was no written evidence.

Upon the whole my opinion is, that the evidence of *John Jacobs* was improperly rejected; and therefore the judgment of the Common Pleas should be reversed. Upon the other exception, respecting the rejection of the evidence of the testator's declarations, made shortly before and after the date of the two wills, I give no opinion.

YEATES J. after stating the evidence and the exceptions, delivered his opinion as follows.

It is certain that our act of assembly of 1705, "concerning the probate of written and nuncupative wills," differs in

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many particulars from the *British* statute of frauds and perjuries, 29 *Car. 2. c. 3*. In *England*, by section 5, the wills "must be attested and subscribed in the *presence* of the devisor by three or four credible witnesses, or else they shall "be utterly void and of no effect." There the attestation in the testator's presence, is as essential as his signature. *Doug. 244. Carth. 79. 1 P. Wms. 239*. But it is sufficient if the testator be in such a situation, that he might see the witnesses sign, though he does not actually see them. *2 Salk. 688. 3 Salk. 395*. And where it does not appear by the terms of the attestation, that the witnesses subscribed their names in the presence of the testator, it is submitted as a fact to the jury, to determine, upon all the circumstances of the case, whether this provision of the law has been complied with. *Bull. 265. 2 Stra. 1109*. In this state, by section 1st of our law, all wills in writing, whereby lands are devised, being proved by two or more credible witnesses, shall be good and available to grant lands as well as goods; and it has been determined that it is not necessary here, that there should be subscribing witnesses to a will. *1 Dall. 94*. Our late brother Judge *Smith* drew his will with great minuteness, but no witnesses attested it. I fully know, that with him it was a favourite idea, that it was inexpedient to call in witnesses to subscribe a will, when the handwriting of the testator was readily susceptible of proof.

It will therefore be evident that the *English* cases on this branch of the law, are in many instances inapplicable to our system. In *Lawson v. Morrison and others*, *2 Dall. 289*, it is said by *M^cKean* Chief Justice, that wills of lands must be revoked by writing, accompanied with solemnities equal to those necessary for making the wills. In *Boudinot and Wallace v. Bradford*, at the sittings in the city in *January 1797*, this point came before all the judges of this court for their decision. The defendant's counsel contended there, that the revocation of a will might be by parol before the statute of frauds, as the statute of wills did not direct what should be a revocation; *3 Mod. 260. 3 Burr. 1251*; that our act adopted part of the *British* statute, but rejected other parts of it, and particularly the 6th section which contains *exclusive* words respecting the revocation of a will of lands; and that the 6th section of our act being confined expressly "to a

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“will in writing, concerning any goods or chattels or personal estate,” it followed, that the revocation of a will of real estate, must be governed by the decisions anterior to the statute of frauds. But the court unanimously resolved, that it never could have been designed by the legislature, that greater solemnity should be observed in the repeal or alteration of a written will concerning personal estate, than when it respected lands which were permanent in their nature, and would pass from generation to generation. The first section of our act directs, that all wills of real estate, proved by two witnesses, shall be valid unless they appear to be *annulled, disproved, or revoked*. And in the following section it is provided, that if any of the wills shall, within seven years after the testator’s death, “appear to be disproved or annulled before any judge or officer having consuance thereof, or shall happen to be revoked or altered by the testator, either by a latter will or codicil in writing *duly proved as aforesaid*, then and in such case the party aggrieved may have his remedy” &c. The law supposes, that by a will being burnt, cancelled, torn or obliterated by the testator himself, or in his presence by his directions and consent, it ceases to be a will *ex vi termini*; and prescribes that the revocation by a latter will or codicil in writing must be *duly proved as aforesaid*; that is, by two witnesses in the manner before pointed out.

It is agreed on both sides here, that the republication of a will must be accompanied by the same solemnities, as were necessary to the publication in the first instance. And such is the current of authorities. *Fitzgib.* 229. 1 *Ves. jr.* 497. 2 *Ves. jr.* 660. 3 *Salk.* 154. *Bull.* 254. 2 *Johns.* 31.

With these introductory observations, I proceed to consider the errors assigned on the record.

It is contended that the contents of the will of August 1806, ought to have been permitted to be proved to the jury. An objection hereto presents itself at once. A written paper intended as a will at first, but burnt or destroyed before the testator’s death, ceases to be a will, and is void in itself. Evidence therefore cannot be received of the contents of a will, which did not exist at the death of the testator. *Aleyn.* 2. 35. It is true, that a will, though gnawed to pieces by rats in the life of the testator, if by joining the pieces together

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its contents may be known, will be capable of proof. 1 *Eq. Abr.* 402. So if a will be snatched from the hands of the executor, by a friend of the heir at law, and torn in pieces, a decree in equity will establish the will, when the pieces are picked up and stitched together. 2 *Fern.* 441. But in both these instances, the wills were in existence, and legally took effect when the testator died. A will shall not be revoked even by a subsequent writing, unless that be also a good will in all circumstances. 3 *Mod.* 258. *Carth.* 79. 1 *Show.* 89. To affect a devise in a former will, it must be shewn in fact, that it was revoked by another will which subsisted at the death of the testator. *Cowp.* 92.

But supposing that this objection could be got over, it will not be said that the contents of the will of *August*, could be better evidence than the will itself if produced. Would then this will be relevant evidence on the feigned issue? It preceded the will of *September*, and was expressly revoked thereby. It could have no influence on a latter will, unless proved by two witnesses to have been duly republished after the execution of the will of *September*. An attempt has been made to prove this republication, and the testimony has been heard; but the jury have negatived it by their finding. The ground of fraud I shall consider hereafter.

I distinguish this case on the point now under consideration, from that of *Goodright v. Harwood*, reported in 3 *Wils.* 497. There a special verdict found, that the testator had duly made and published a will in 1748, under which the defendant claimed; and that he made and duly published another will in 1756; that the disposition made therein was *different* from the disposition in the will of 1748, but in what particulars was unknown. The jurors said that they did not find that the testator cancelled his will of 1756, or that the defendant destroyed the same; but what was become thereof, they said they were altogether ignorant. Three of the judges of the Court of Common Pleas held, that the *subsequent* will in writing, found by the jury to be different from the former, was a sufficient proof of the revocation of the will of 1748. This judgment was afterwards reversed in the King's Bench, and that reversal was affirmed in the house of lords. 2 *Bla. Rep.* 937. A deliberate act, plainly inconsistent with the disposition of property under an antecedent will, may fully

evinced the intention of revocation, completely carried into effect by the testator; but the contents of the will offered here to be shewn in evidence, could not in my idea impair the validity of a will, solemnly executed one month afterwards. In this particular, a strong line of distinction is marked between the two cases; and in my view of the point under consideration, the contents of the antecedent will would not be *relevant* testimony in the cause then trying.

It has likewise been contended, that other declarations of the testator made shortly before and after the dates of both wills, ought to have gone to the jury, upon three grounds. 1st, That it has been the settled practice of this court to receive evidence of what either of the parties has said at and immediately before the execution of a written instrument; 2dly, That such evidence might have shewn a republication of the will of *August*; and 3dly, That it tended to prove a fraud committed on the testator.

We are left wholly in the dark as to the nature of those declarations, which the Court of Common Pleas refused as evidence; and here has been my greatest difficulty. Unless they were stated precisely on the trial, I do not see how that court could have decided on the propriety or impropriety of the testimony offered. That great latitude was allowed on the trial, to the declared intentions of the testator in favour of *Benjamin Havard* the now plaintiff in error, is very plain to any one who will barely inspect the testimony of *Sarah Havard*, and *John Jacobs*. Whether the testator had duly executed those favourable intentions in the only manner known to the law, was the question of fact then to be tried. I cannot for a moment suppose that the court below rejected evidence of the testator's declarations, tending to shew that he had republished the will of *August*, because this would have been a plain inconsistency on the very point upon which testimony had been before liberally admitted. Could I collect from the statement, that this had been their decision, I should have no hesitation in pronouncing it to be erroneous. Subscribing witnesses are not necessary under our law to a republication. But the act of setting up a former will, and the annulling of a latter will inconsistent therewith, and which contained an express clause of revocation of former wills, should be clear, plain, and unambiguous. I am per-

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fectly aware, that artifices and address are often used to prevent the particulars of men's wills being made known, in order to preserve peace in their families; and that this caution more particularly obtains, where there are no lineal descendants, only collateral heirs depending on their bounty. In the words of *Chambre Justice* in *Longchamp v. Fish*, 5 Bos. & Pul. 420. "Testators are generally very averse
"to have their intended dispositions of property made known
"in their families before their deaths; and (blind) men, who
"stand so much in need of attention from their relatives,
"would probably be peculiarly averse to it. The remainder
"of their lives, might in consequence of such disclosures,
"be rendered completely uncomfortable. At all events they
"might produce great discord in families." Lord Chancellor *Eldon* says, "few declarations deserve less credit than
"those of men as to what they have done by their wills.
"They wish to silence importunity, and to elude questions." 13 Ves. jr. 301. And Lord Chancellor *Erskine* has declared that "loose declarations of a testator, under circumstances
"imposing upon him no obligation of veracity, are nothing." *Id.* 313.

The usage of *Pennsylvania* in admitting evidence of what passed at and immediately before the execution of a written instrument, is said to have arisen in this court before the *American* revolution, in *Hurst's Lessee v. Kirkbride* and *Riché*, and was founded on the case of *Harvey v. Harvey*, 2 Cha. Ca. 180. It was intended thereby to guard against frauds and mistakes, in which there would be relief granted in a Court of Chancery. 3 Atk. 77. 388. 1 Ves. 457. 2 Ves. 375. But I do not take the principle to be applicable to wills. The mistake of a testator cannot be rectified, because there is nothing to shew what would have been his intention, if there had been no mistake. 1 Ves. jr. 364. Want of knowledge of points of law, or the omission of part of a testator's property, are not circumstances sufficient to vitiate a will. 1 Hen. and Munf. 476., Cas. Temp. Talb. 240., 3 Ves. jr. 402., 4 Bro. Par. Ca. 179., 186. 13 Ves. jr. 376. If the scrivener who draws a will, uses such expressions as will pass an estate to a devisee different from what is intended by the testator, there is no remedy for the evil. *Litera scripta manet*. But in a contract between individuals, equity will redress the

mischief, where mistake has intervened. So in the common case of a bond from two persons drawn jointly, where the obligation was intended to be joint and several.

Here the bill of exceptions states, that these declarations were offered in evidence "for the purpose of shewing the intention of the said *Samuel Havard* to dispose of his estate differently from what was done by the said paper writing read to the jury, and that he had made no such writing as that read to the jury." How then are these words to be construed? If it was intended to bring forward the declarations of a man of fourscore years and upwards, made at different times, which, when connected together, would serve as distinct links in the chain of testimony, evincing a system of fraud and imposition practised against him; if it was meant to shew that the plaintiff below or his friends amused the old man with false pretences or other subtle contrivances, and by secluding him artfully from his other relations, either by circumvention or duress unduly influenced him to execute a will contrary to his own judgment, and to which his heart was an entire stranger, then such evidence would be clearly admissible; because under such circumstances it was no will in point of law. *Pow. on Dev.* 695. It has been determined in *Small's Lessee v. Allen*, 8 Term Rep. 147, that parol evidence might be given of questions asked by the testator at the time of executing his will, whether the contents were the same as those of a former will, to which he was answered in the affirmative, and was thus tricked into the execution of a will foreign from his mind. The rule of law, as well as of morals, unquestionably is, that no one shall derive a benefit from a fraud, practised either by himself or others to his own advantage. 2 Vern. 506. 699., 1 P. Wms. 288. It vacates all acts whatsoever.

But on the other hand, if these declarations were offered in evidence as indicative of the state of the testator's mind at the periods to which they refer, and tending to shew that at certain times his affections and inclinations were more strongly attached to his nephew *Benjamin Havard*, than to his other nephew *John Havard Davis*, and that his wish was that his landed property should not go out of the name of *Havard*, and from thence to deduce the inference, that the will

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of *September* ceased to be valid, then I have no difficulty in asserting, that the testimony ought not to have been received. Such declarations cannot amount to the revocation of a will duly perfected, without some *act done* at the time, evincing the *animus revocandi*, or shewing not only a plain intention to republish a former will, but likewise really and truly carrying this intention into execution. The admission of them to a jury, would be in direct violation of the spirit or policy of our law, and would lead to the grossest frauds and perjuries. According to Lord Chancellor *Erskine* in the case already cited, "the mind of a testator is to be viewed not "through his *declarations* only, which are of no value compared with his *acts*." 13 *Ves. jr.* 309. In the words of the act, as applied to personalty, "no will in writing shall be repealed, nor shall any clause, devise or bequest therein, be "altered or changed by any words, or will by word of mouth "only, except &c." But the effect of the evidence thus offered, would be to shew, that the bent of the testator's mind varied from the instrument which he solemnly and knowingly executed.

From the summary of the evidence which I have taken, and the whole record, it appears to me that the natural import of the words used in the bill of exceptions, clearly leads to this latter purpose. Had the counsel for the defendant below conceived, that they had any reasonable grounds from which they might conclude that any trick or foul management had been committed on the testator, by the plaintiff or his father the executor, with respect to this will, or the republication of the former will, they would not have failed to have so expressed themselves in their exception; and had it been urged to the president of the court below, that the declarations of the testator were offered to establish fraud, undue influence or duress used towards him, I am fully persuaded there would have been little controversy respecting the admissibility of the testimony. Thinking as I do of the expressions in the bill of exceptions, I am of opinion that the judgment of the Court of Common Pleas be affirmed.

BRACKENRIDGE J. The issue before the jury in this case, involved two questions of *fact*, in their nature, divisible.

1. Is the writing of the 19th of *September* the will of *Samuel Havard*?

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2. Is it the last will?

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There is testimony which goes to the proof of his *hand-writing*, in which this will of the 19th is said to be, and which goes to the publication of it as a will. This proof is assailed, not *directly* by counter evidence, shewing it not to be his handwriting in the body of the will, or in the signature, or by evidence affecting the testimony of the subscribing witnesses, shewing them not to be of good character or of sound discernment, or to be interested; but *indirectly*, on the ground of circumstances, and by testimony to the declarations of the testator, inducing a presumption that it was not his will, or that it was not his last will.

Such evidence would seem to me to have been admissible. For it is not admitting parol evidence of a will, either as to the *making* it, or as to the contents of it, but of a fraud alleged in the production of a writing as a will, which is not.

I admit that testimony of declarations by the testator as to his intentions of disposing, or the harsh and unnatural character of the disposition he is alleged to have made, could weigh nothing to set aside the will, supposing it to have been made; but to disprove the making it. Nor could such testimony go a great way to the disproving it. But still it might go some length, connected with some circumstances already proved, which this is introduced to fortify. Here there is the circumstance of a former will containing contrary dispositions; and testimony inducing a presumption that this *former* will did *exist at the death of the testator*, and that it came to the hands of the plaintiff.

Taking it as proved, that the testator did make the will of the 19th of *September*, yet it may not have remained his last will, but may have been superseded by a republication of the former; which introduces the question, can parol proof be admitted of the *republication of a will*? If proof of the publication of a writing as a will may be by parol, proof of the republication may also be. I assume it to be the law of this state contrary to the law of *England*, and to come under the head of that "other proof" which is spoken of in the act of assembly, that proof of the publication of a writing as a will, may be by parol. If correct in this, the evidence offered

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might warrant the jury, in concluding that the will of the 14th of *August* was republished subsequent to any publication of the will of the 19th *September*; and if so, it will destroy the existence of that of the 19th as a *last* will, though it may not establish that of the 14th as a will. For it is one thing to prove that a will of the 14th was republished and became a last will, and to prove what that will was, or to give evidence of the contents of it, for any other purpose than as it bears on the question in this case, which is, whether there was a will of the 19th of *September*, and whether that was the last will.

If, on this evidence, the existence of a writing of the 19th as a will, or as a last will, shall have been removed out of the minds of the jury by a conclusion in favour of that of the 14th, yet it will be another question, whether parol evidence shall be admitted to entitle the contents to probate, or to support the dispositions under it. For, even allowing it to be considered to be the law of *Pennsylvania*, that "other proof" may be given of the making and publication of a will than the *attestation of subscribing witnesses*, yet proving the contents of that will is a *step beyond*, and is admitting parol proof to make a will. Fraud may be so far relieved against as to defeat the obtaining an advantage from it; but it may not be possible, consistent with general rules, to relieve from all injury by means of it.

If a copy of the will could be produced, the original being proved to have been lost, that safely might be established in the place of the original. But taking the contents from the memory of a witness, would not be within the meaning of that "other proof" which the act contemplates. But the question before us is not, whether parol proof shall be admitted of the contents of the will of the 14th, but whether the parol proof offered, ought to have been admitted for the purpose of destroying the will of the 19th as the last will, or as a will at all.

2 In support of the allegation that the will of the 19th is *supposititious*, the evidence is, that the father of the plaintiff *William Davis*, had in his possession the papers of the testator the day but one after the funeral, and a bond due from him to the testator, which is proved to have been amongst those papers but a short time before the

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death of the testator, and of which the testator spoke as apprehensive that it might come to the hands of the plaintiff the son; from which a *presumption* arises that there may have been a spoliation of these papers. And there being proof that a writing did exist a short time before the death of the testator, purporting to be a *last will*, and with different subscribing witnesses, and that writing being deposited in the same desk with the bond so missing, a *presumption* arises, that this may have been suppressed by the purloiner of the *bond*, who had also an interest in suppressing this will of *August*, his son having an interest. Not, that I assume it, that these presumptions would justify the conclusion, and establish the fact of the suppression, and the fraud of a substituted will; but that it is evidence which is admissible in deciding on the question, and ought to have gone to the jury, who were alone competent to weigh the presumptions, and draw the conclusions. And the advantage of this could not be had, without going into proof of the writing alleged to be suppressed, and which purported to be a will, that is, into evidence of all circumstances relating to it.

As to the giving *notice* to the plaintiff, or to the executor, to produce this writing, before any evidence relating to it could be offered, if that were necessary, notice has been given; and the writing not being produced if it did exist, the next best evidence is that which has been offered, and which I think ought to have been admitted. I am therefore of opinion that the judgment of the Common Pleas be reversed.

Judgment reversed.

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Philadelphia,
Saturday,
March 31.

SULGER against DENNIS.

The plaintiff, a master of a vessel, proved that while abroad, he had expended money upon account of his owner the defendant, for seamen's wages, provisions, port duties &c. *without shewing how much;* and the omission to produce vouchers was in some measure accounted for by the capture of his vessel, and the loss of his papers.

Held, that under these circumstances, the jury might make what they thought a reasonable allowance for disbursements, without further evidence.

A rule for trial or *non pros.* has no effect upon the plaintiff's right to interest.

IN this case, *Ingersoll* for the defendant, moved for a rule to shew cause why there should not be a new trial, upon the ground that the verdict had been given without evidence.

By the report of the Chief Justice, before whom the cause was tried at a *Nisi Prius* in *February*, it appeared that the action was brought by the plaintiff to recover his wages as master of the defendant's vessel, and certain disbursements made by him abroad on account of the vessel and crew. By the deposition of a witness, the plaintiff proved that he sailed in the brig *Lear* belonging to the defendant, from *Philadelphia* to *Cape François*, and that while there he paid money to carpenters for repairs, and to the crew on account of wages; and that he also paid for provisions and port charges. That from *Cape François* he went in the brig to *Port de Paix*, where he again paid port charges; and that on the voyage from *Port de Paix* home, he was captured by a *French* privateer, by whom his papers and accounts were taken off or destroyed, and he was carried to *Barracoa* and condemned. But the witness could not say how much had been paid by the plaintiff for any particular charge, or in the whole; nor had the plaintiff any receipt or written voucher to support any of his charges, which amounted to 195 dollars. The defendant produced no evidence. The plaintiff's demand, including his wages, which were allowed to be 40 dollars per month, was for 538 dollars 35 cents, and interest from the commencement of the action; and the jury gave him a verdict for 456 dollars 65 cents.

Ingersoll for the defendant admitted, that where vouchers were lost, it was proper to relax the rule of evidence; but in this case it did not appear that receipts, for which the plaintiff claimed an allowance, were ever in existence; and if they were, they must have been deposited in the admiralty, where the plaintiff might have obtained them or copies of them. There was therefore no legal evidence of the plaintiff's demand, except as to wages. It is in the highest degree

dangerous, that upon the mere proof of some expenditure, the defendant should be at the mercy of a jury to guess at what is due. The wages were not disputed; but the jury have gone beyond that, and allowed not only the disbursements, but interest from bringing the action. Interest certainly should not have been allowed; because the plaintiff's demand was not ascertained, and he delayed the trial himself, having been under a rule to try or *non pros*.

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Hare for the plaintiff, said that upon all motions for new trials, it should be shewn that the verdict was against the justice of the case, which could not be pretended here. That the omission to produce vouchers was fully accounted for by the capture, and the spoliation of papers. That the existence of vouchers could not be proved by the captain, because no man called witnesses to a receipt; and that as the papers did not concern vessel or cargo, there was no probability that they had been deposited in the admiralty. That it came therefore to this question, whether when disbursements were proved, but from accident the plaintiff was unable to prove the amount, a jury were at liberty to make a reasonable allowance; and this principle was assented to by this court in *Kingston v. Girard* at Nisi Prius in June 1803. So in *Field's Assignees v. Moulson*, which was an action against a factor for the amount sales of goods, there was no proof of what the goods sold for, but Judge *Washington* left it to the jury to presume. [TILGHMAN C. J. There it lay upon the factor to shew the sales.] As to interest, if any is given, it is due; the delay was not the plaintiff's fault.

TILGHMAN C. J. after stating the facts, delivered his opinion as follows:

It is contended by the counsel for the defendant, that the verdict was without legal evidence, (except as to the plaintiff's wages as captain, which were not disputed) because the proper evidence was a receipt for the several sums paid. It is also contended, that the jury ought not to have allowed interest, because the plaintiff had been laid under a rule for trial or *non pros*, which shews that the trial had been delayed by him. The first of these objections would have great weight, if there was not something in this case to distinguish

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it from cases in general. In foreign ports, the captain may be under the necessity of making frequent disbursements of small sums for provisions &c., for which it would be hard to insist on his producing receipts, because they are not usually taken in such cases. But it would be dangerous to lay it down as a principle, that the captain's bare word should be taken for considerable sums, such as every prudent man ought to take a receipt for. In this case however, the privateer took away the plaintiff's papers, which is some apology for his not producing them. The defendant says, there ought to be proof that there were receipts among these papers. But how is this to be proved? Who was privy to the taking of those receipts, except the plaintiff himself? Is it usual to call witnesses, when a man takes a receipt? The defendant objects also, that all the papers taken in the brig, were deposited in the *French* Court of Admiralty; where the plaintiff might have obtained his receipts, or copies of them. It is very true, that the papers ought to be deposited in the court of admiralty; but it is not quite certain that what ought to be done, always is done. It was given in charge however to the jury, that if they should be of opinion, that the plaintiff's papers were taken by the privateer, and not deposited in some place where he could have access to them, they might make a reasonable allowance to the plaintiff for disbursements as to such objects as he had given evidence of, viz. provisions, port duties, advances to seamen, payment to carpenters &c. The jury made, what they conceived, a reasonable allowance in all these cases, and it does not appear clearly to me, that injustice has been done. The defendant has never said what he thought would be reasonable; nor did he offer any evidence that the plaintiff's charges were unreasonable. He stood on no other ground, than the defect of the plaintiff's testimony. Under these circumstances, I see no good reason for setting aside the verdict, on the first point.

I will now consider the objection as to interest. We cannot ascertain with any degree of certainty, how much was allowed for interest. It is probable however, that the jury struck out some articles of the plaintiff's account, and gave interest from the commencement of the action for the residue. In this I cannot say that they were wrong. It is usual to give interest, unless the case has something particular in it. There is no weight in

the objection, of the plaintiff's being under a rule for trial or *non pros*. A man may be forced to postpone his cause, on account of the absence of witnessess, without any fault of his own. One reason for allowing interest is, that the defendant may very probably have been making a profit on the money which was due to the plaintiff, and this profit would be made, even if the trial had been postponed by the fault of the plaintiff. If the defendant had brought into court the sum that he thought the plaintiff fairly entitled to, he would have stood on much stronger ground. But he denied the plaintiff's demand *in toto*. Upon the whole, I do not think this a case, in which the court ought to interfere with the verdict. I am therefore against the defendant's motion.

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YEATES J. and BRACKENRIDGE J. concurred.

Motion denied.

The Commonwealth *against* EMERY.

IN ERROR.

Philadelphia,
Saturday,
March 31.

UPON error to the Common Pleas of Philadelphia county the case was thus:

The action was debt upon a recognisance in 2000 dollars, entered into by the defendant before alderman *Keppele*, and conditioned for the appearance of *Stephen Austin*, at the next Mayor's Court for the city of *Philadelphia*, to answer to a charge of conspiracy &c. Plea, *Nil debet*.

At the trial in the Common Pleas, the attorney for the commonwealth gave in evidence the docquet of alderman *Keppele*, in which was entered the following memorandum.

Commonwealth
v.
Stephen Austin and
Eliza Burns.

Sur charge founded on oath of
George Reinholdt, that they have entered into a conspiracy with an intention of extorting money from him &c.

The short minutes of a recognisance taken by a magistrate, and returned by him into court, where the recognisance was forfeited, may be given in evidence to maintain an action on the recognisance, provided they substantially shew the amount and condition, and that the party was bound to the commonwealth.

2 B 431
30 SC 365

1810. <hr/> COMMON- WEALTH v. EMERY.	<i>Stephen Austin</i> in 2000 drs. <i>Samuel Emery</i> in 2000 drs.	}	On condition that <i>Stephen Austin</i> be and appear at the next Mayor's Court to answer. .	3 Nov. 1807. (signed) <i>S. Austin.</i> <i>Saml. Emery.</i>
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He also gave in evidence, a certificate under the hand and seal of the clerk of the Mayor's Court, that the above recognisances were returned to the Mayor's Court by alderman *Kepple* on the 5th of *November* 1807, and remained filed of record therein; and that on the 13th of *November* 1807, the recognisance of *Emery* was forfeited in the Mayor's Court, for his default in not bringing forth the body of *Austin*. This certificate described the recognisances, as they appeared in the alderman's docquet, except that the word *in*, after the names of *Stephen Austin* and *Samuel Emery*, was omitted.

The court charged the jury, that this evidence was not sufficient to support the action, and the plaintiff tendered a bill of exceptions.

C. J. Ingersoll and *Sergeant* for the plaintiff in error. The objections to the evidence are, that the memorandum is not a recognisance, but a loose note of no authority; that it wants words of obligation; and that it does not appear to have been made to the commonwealth. A recognisance is a verbal acknowledgment of debt, before some court or officer having authority. It is not requisite that it should be reduced to form, and signed by the party, because it is a matter of record so soon as it is taken and acknowledged, although it be not made up. A short note, such as "*A. B.* in "40*l.* to appear &c." is sufficient to make the record from. 4 *Burn's Just.* 84. 18th ed. The practice is for the justice to repeat the words to the parties, who say they are content; and afterwards he certifies it to the proper court. In *England* it is certified in form. In this state it is not. The magistrate universally certifies his memoranda, putting all that he has taken on one paper, and signing his name at bottom. But his signature is never essential, it being only for the satisfaction of the court. Form is dispensed with, and nothing is required but substance, which this recognisance has. It has the

amount, and the condition set out. It is made to the commonwealth, because the title of the prosecution is put above, shewing it to have been taken in that suit; and although the word "bound" is not inserted, yet the amount, and the condition necessarily imply an obligation. It is impossible to mistake the meaning, and that is all we want.

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Condy and *M^r Kean* for the defendant in error. A recognisance is a bond of record, to which writing is essential; and although it may be made up from a note or memorandum, yet the note is not the recognisance. The recognisance is the acknowledgment reduced to form, and signed by the magistrate; and the act of *December* 9, 1783, requires that this itself, and not a loose note of it, shall be certified. 2 *St. Laws* 167. The memorandum given in evidence has not even the substantial parts of a recognisance about it. In order to bind a party, there must be words of obligation, to owe or to be bound. But the memorandum has nothing of it. In the clerk's certificate, which gives the recognisance on which action was brought, that is, the forfeited recognisance, the word *in* contained in the alderman's docquet, does not appear; so that it stands, "*Samuel Emery*, 2000 drs." still less certain than the original note. Nor does the acknowledgment appear to have been made to the commonwealth. It may have been made to the prosecutor, whose name as well as the title of the prosecution, precedes the note. It is sufficient however that it does not appear how it was. To say that the meaning is certain, notwithstanding these omissions, is to take an inference for a fact. It is not certain, because the memorandum may receive various constructions; and besides, it is not the meaning of what is written, but of what is omitted, that is in controversy; and if substance is omitted, certainly it is no recognisance.

TILGHMAN C. J. after stating the bill of exceptions, delivered his opinion as follows:

There is no doubt but the alderman had power to take the recognisance, nor has any question been made on that point. The objections are, that the evidence given to the jury was not a recognisance, but only a loose note, by which it did not appear that the defendant was bound to the com-

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monwealth, or bound at all, and that it was not signed by the alderman. A recognisance is a debt of record, entered into before some court, judge, or magistrate, having authority to take the same. By the act for establishing courts of judicature, passed in the year 1722, justices of the peace, in or out of sessions, are authorized to take all manner of recognisances and obligations, which any justice of the peace of *Great Britain* may do; and when the recognisances are taken out of sessions, they are to be certified to the next general sessions of the peace. In the city of *Philadelphia*, the aldermen have all the authority of justices of the peace, and recognisances taken by them are certified to the Mayor's Court. The manner of taking a recognisance is, that the magistrate repeats to the recognisors the obligation into which they are to enter, and the condition of it, at large, and asks them if they are content. He makes a short memorandum, which it is not necessary that they should sign, although a custom has lately taken place in this city, for the recognisors to sign their names. From this short minute, the magistrate may afterwards draw up the recognisance in full form, and certify it to the court. This is the most regular and proper way of proceeding. But the general, and almost the universal practice is, to certify either the original, or a copy, of the short memorandum. The justices and aldermen usually certify in this manner all recognisances taken by them and returnable to one court, and sign one general certificate relating to them all. In the present case, both the original memorandum, and a certified copy of the return to the Mayor's Court, were given in evidence; and it appears to me that the evidence was sufficient to support the action.

In all countries there are particular modes of doing business, which are known and regarded by their courts. Our courts and justices transact their business with much less form than in *England*. By this we save much expense, although we are sometimes subject to ill consequences arising from uncertainty. In this commonwealth, the records of the courts of justice, consist principally of short entries, not reduced to form. It is sufficient if these entries contain substance capable of being worked into form. I think it reasonable to apply the same rule to recognisances taken by magistrates out of court. The question will then be, whether the

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memorandum given in evidence in this case, contained substance sufficient to be drawn into a formal recognisance? I think it did. It contained the sum in which the recognisors were bound, and the nature of the condition. It was entitled *The Commonwealth v. Austin*, and the crime with which he was charged, was sufficiently mentioned. From all this it is evident that the recognisors were bound to the commonwealth, although it is not expressly said so. I should not be for confirming any illegal practice of justices of the peace, or any practice not expressly sanctioned by law, which might be attended with dangerous consequences. But I see nothing illegal or dangerous in their practice of taking and certifying recognisances by short minutes, or in permitting those minutes to be given in evidence to juries, as often as questions arise on the recognisances. Whether they contain sufficient substance, will always be open to inquiry. In the case now before us, I think the papers offered in evidence, did substantially support the issue joined on the part of the commonwealth; and I am therefore of opinion that the judgment of the Court of Common Pleas be reversed.

YEATES J. and BRACKENRIDGE J. concurred.

Judgment reversed.

1810.

FITZSIMONS administrator of H. SALOMON against
E. SALOMON.

Philadelphia,
Saturday,
March 31.

IN ERROR.

If a judgment for want of an appearance is entered against an administrator, and it appears by the *præcipe* that there were not ten days between the summons and return day, the judgment is erroneous.

The *præcipe* for the original writ is a part of the record, and should regularly be sent up with the process and pleadings, upon a writ of error.

The plaintiff may proceed against an executor by *capias* to compel an appearance; but if he elects to proceed by *summons*, then, in order to entitle himself to judgment by *nil dicit*, he must pursue the act of 20th March 1724-5, as if the suit were against a freeholder.

2 B 436
e215 191

THIS was a writ of error to the Common Pleas of Philadelphia county, upon which the general errors were assigned. Plea, *in nullo est erratum*.

The action was instituted by *summons*, against Thomas Fitzsimons and Rachel Heilbron administrators of Haym Salomon, upon a promissory note drawn by the intestate's agent, and indorsed to Ezekiel Salomon, the plaintiff below.

The *summons* was issued to March term 1807, and returned by the sheriff "copy left at the dwelling house of Thomas Fitzsimons, and nil habet as to Rachel Heilbron," but without mentioning the *day of service*. March term 1807 commenced on the *second of March*; and on the 20th, the plaintiff's attorney filed his declaration, and signed judgment for want of an appearance.

The record not setting forth the date of the service, nor the time when the summons issued, the plaintiff in error, after issue, alleged diminution of the record, and prayed a *certiorari* to bring up the *præcipe*, which was granted, and the *præcipe* was returned, dated the 24th of February 1807.

Several exceptions were taken to the judgment. 1. That a summons was not the proper process against executors or administrators. 2. That there were not ten days between the issuing of the summons and the return. 3. That the time of service was not mentioned in the return. 4. That the declaration was not filed five days before the return. 5. That the judgment was not entered on the return day. 6. That a common appearance was not entered before the judgment. 7. That judgment was entered for want of appearance, instead of by *nil dicit*.

Phillips, Meredith, and Ingersoll for the plaintiff in error. The material exceptions are the 1st, 2d, and 6th. The regular process against executors is a *capias* to compel a common

appearance. The act of the 20th *March* 1724-5, 1 *St. Laws* 224, which devises the writ of summons, is confined to freeholders only; and the plaintiff cannot proceed under that act, against any but freeholders. But if executors, either by practice or a liberal construction, come within the act, then its directions must be strictly pursued. The act is express, that the day of the service must be mentioned by the sheriff, that the writ must be served *ten days before the return*, that the declaration must be filed five days before the return, and that, these things being complied with, if the defendant makes default, the plaintiff may enter a common appearance for him, and proceed to judgment by *nil dicit*. There is no such thing known to this act as a judgment for want of an appearance. Setting aside then other objections, the want of ten days between the service and the return day is a fundamental error. The plaintiff below is bound to bring his case within some act, for otherwise he stands at common law, by which there cannot be a judgment against the defendant until he has been in court. The statute 8' and 9 *W. 3. c. 25*, was made to remedy this defect by imposing a penalty upon the defendant for not appearing; and it was at last cured by the 12 *Geo. 1. c. 29*, in the same year with our act, authorizing the plaintiff to enter an appearance for the defendant. The plaintiff has but three modes of proceeding by summons, either under the act of 1724, or at common law, or under the act of 21st *March* 1806, which authorises judgment only at the second term; 7 *St. Laws* 562; but he has pursued neither.

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Browne and *Rawle* for the defendant in error, contended, that the want of a proper interval between the summons and return, did not appear on the record, because the *præcipe* was not a part of the record. It is a direction by the attorney to the prothonotary, which may be altogether dispensed with, and supplied by a verbal order; it therefore takes the place of a verbal order, and cannot be set up to contradict the record. It has been brought up too, after *in nullo est erratum*, when regularly no diminution can be alleged, although the court may award a *certiorari* to inform their conscience. *Noy* 83. But this they will do only to amend the record, but not to reverse the judgment. *Cas. Temp. Hardw.* 118. Granting however, that the *præcipe* is a part of the record,

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the objection to the want of ten days' service, goes merely to the regularity of process, to the propriety of the service, which cannot be assigned for error, even after judgment by default. 5 Com. Dig. 717. Pleader 3 B. 16. And as to the other exceptions, they are either contrary to the record, or they are matter of which the defendant might have taken advantage below. But the fact is, the proceeding in this case was not under the act of 1724. It was under an established practice of issuing a summons against executors, and of taking judgment for want of an appearance after four days' service.

In reply it was said, that the *præcipe* had repeatedly been treated as a part of the record, to ascertain the commencement of the suit, to amend by &c.; and that the objection to the *certiorari* after issue was now too late, as it had already been returned. But that it was not law, that the court would not issue a *certiorari ad informandam*, for the purpose of reversing a judgment, the authorities cited in 2 Bac. Abr. 469. Error E, being expressly to the contrary. The authority upon which *Comyns* relied, to prove that a defect in the service of a summons could not be assigned for error after judgment by default, did not support him. *Doderidge* held the other opinion, and the case went off upon a division of the court. *Salkeld v. Howard (a)*. As to the practice referred to, if it existed, it had not the sanction either of the legislature or the court.

TILGHMAN C. J. The plaintiff in error in this case, has assigned a number of errors. I shall confine my opinion to one, viz. that there were only five days between the issuing and return of the summons. It does not appear, on the face of the summons, at what time it issued, nor does the return of the sheriff shew, on what day it was served. In order to ascertain the matter, the plaintiff in error alleged diminution; and a *certiorari* having issued from this court, the *præcipe* has been brought up, by which it is evident, that there were but five days between the issuing and return of the summons. But it is objected by the defendant in error, that we can take

(a) Cro. Jac. 547.

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no notice of the *præcipe*, it being no part of the record. If the day of issuing the summons is a material fact, and there is evidence of this fact among the papers filed of record, in the office of the prothonotary of the Court of Common Pleas, it would be extraordinary if this court were debarred from looking at these papers. I consider the *præcipe* as part of the record. It is the foundation of all the proceedings, being the order of the plaintiff's attorney for issuing the first process. That it is part of the record, is manifest, from this, that the court may order an amendment of the summons, according to the *præcipe*. Some confusion concerning writs of error, has arisen from the different practice in the courts of *England* and those of this country. In *England* the writ of error is directed to the Chief Justice alone, and consequently the return is made in the first instance by him only. His clerk has not the custody of the different writs, which have been issued in the course of the cause; and therefore he returns only the plea-roll, consisting of the pleadings, the verdict, and the judgment. The plaintiff in error, if he intends to assign error in any matter not appearing in the body of the record, returned by the Chief Justice, is obliged to allege diminution in the particular part, in which the error lies, whereupon a *certiorari* issues to the officer who has the custody of that part, and on his sending it up, it becomes part of the record in the superior court. Our practice is different. The Chief Justice of this court, or the president of the Court of Common Pleas has not the keeping of any part of the record. The whole is in the custody of the prothonotary of each court. Writs of error, therefore, are not directed to the Chief Justice, or the president, but to the whole court. Consequently there can be no objection to returning the whole record, including the *præcipe* and every part of the process, at once. This will prevent the delay, arising from the necessity of issuing a writ of *certiorari* when diminution is alleged, and I hope that in future, this mode of making the return will be adopted.

The next consideration is, whether the want of ten days between the issuing and return of the summons, is error. It is presumed, that the practice of issuing a summons against executors and administrators, has arisen from a very liberal construction of the act of 20th *March* 1724-5. This act does not expressly extend to executors, but in its terms is confined

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to freeholders, who, except in certain cases, are exempted from arrests, and are to be proceeded against by summons. In case of nonappearance after summons, provided it has been served on the defendant ten days before the court, the plaintiff is authorised to file a common appearance for the defendant, and proceed to judgment by *nil dicit*. It was decided by the late Chief Justice *Shippen*, when president of the Court of Common Pleas, in the case of *Mary Penrose v. Jonathan Penrose &c. executors of Joseph Penrose*, (June 1786) that the plaintiff may still proceed by *capias* against an executor. But granting, for sake of the argument, that he may proceed by summons at his election, he must take this process subject to the provisions in the act above mentioned; he shall not be entitled to a judgment by default, unless the summons has been served ten days before the return day. No reason can be assigned for distinguishing the case of an executor from that of a freeholder. It has been said indeed, that a practice has prevailed of taking judgment by default, against executors, after service of the summons four days before the court. But that practice has been by no means general. The court has never sanctioned it by any decision; and to a practice *sub silentio*, without any law to support it, we ought not to pay much regard. I am of opinion that the judgment is erroneous, and should be reversed.

YEATES J. and BRACKENRIDGE J. of the same opinion.

Judgment reversed.

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Philadelphia,
Saturday,
March 31.The Commonwealth *against* The President and Members of the St. Patrick Benevolent Society.

THIS cause came on upon the return to a mandamus, to restore *John Binns* to his standing as a member of the St. Patrick Benevolent Society.

Without an express power in the charter, a corporator cannot be disfranchised, unless he has been guilty of some offence, which either affects the interests or good government of the corporation, or is indictable by the law of the land; and therefore a by-law to expel a member for *vilifying* any of the members of the corporation, is void.

The president of the society returned—That the said society is a charitable institution, being associated for the purpose of raising a fund sufficient to supply its members in certain exigencies, and for the relief of distressed *Irishmen* emigrating to the *United States*. That it is a corporation or body politic in law, being so made and constituted according to the laws of this commonwealth, on the 5th of *September* 1804. That the said corporation is authorized and empowered to *make rules, by-laws, and ordinances, and to do every thing needful for the good government and support of the said corporation*, provided that the said by-laws, rules and ordinances, or any of them, be not repugnant to the constitution and laws of the *United States*, to the constitution and laws of this commonwealth, or to the instrument of incorporation.

He further certified and returned—That a *certain by-law of the said corporation was duly and legally made and passed, by which it was enacted, ordained and established, that "VILIFYING ANY OF ITS MEMBERS," is a crime against the said society; and it was further directed and ordained by the said by-law, that the punishment for such crime shall be removal from office, fine, OR EXPULSION*, subject to the proviso at the end of the eleventh article of the constitution, that notice shall be given in the time and manner therein prescribed.

He further certified and returned—That the said proviso of the 11th article of the constitution, requires and declares, that no member shall be expelled the society *for any crime whatever*, without first giving him seven days' notice in writing, which shall be exclusive of the day of meeting, specifying the nature of the crime of which he is accused, together with the name of his accuser, and requiring him to attend

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the next meeting of the society, in order that he may have an opportunity of defending himself thereon.

Then the return alleged—That after the society was incorporated as aforesaid, *John Binns* was duly elected and admitted a member of the said St. Patrick Benevolent Society, and subscribed the constitution thereof; and became liable to obey and conform himself to the said constitution, and to all the rules, by-laws, and ordinances duly and legally made and enacted &c.

The return proceeded to state—That the following charges were made against the said *John Binns*, by *William Duane*, a member of the St. Patrick Benevolent Society, to wit,

William Duane a member of the St. Patrick Benevolent Society, charges *John Binns*, a member of the said society, with the following offences against the laws of the society.

1. In falsely and scandalously vilifying the said *William Duane*, on matters which, besides having no foundation in any shape in truth, had no relation to *American* politics, but might greatly tend to excite injurious doubts, scandals and suspicions, of persons whose names were united with the unhappy destinies of *Ireland*.

2. With introducing to public observation the name of a lady whose husband perished in the *Irish* cause, and falsely, scandalously and without any shadow of foundation, insinuating, that the said *William Duane* had been guilty of indelicate or ungenerous conduct to that lady and her son.

3. With violating his obligation to the society in the above base and unfounded conduct towards the said *William Duane*.

The return then certified—That the said *John Binns* was duly notified of the said charges in writing, together with the name of his accuser, in all respects according to the directions of the abovementioned proviso of the 11th article of the constitution of the said society. And that afterwards, to wit on the 17th day of *November* 1807, at a regular and legal meeting of the St. Patrick Benevolent Society, duly called and convened, the said *John Binns* having been duly notified as aforesaid of the said charges, so as aforesaid made against

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him, did attend; and the members of the said society, at their said meeting on the said 17th day of *November*, did then duly hear all which was alleged or offered by or on behalf of the said *John Binns*, in answer to the charges so as aforesaid made and exhibited against him. And *all and singular the premises* having been duly weighed and considered at and by the said meeting, it was duly resolved that the said *John Binns* be no longer continued a member of the said society, and that he be expelled from the same. And *for these reasons and causes*, I the president of the said St. Patrick Benevolent Society, and the members of the said society, in the writ hereunto annexed mentioned, ought not, nor can we restore the said *John Binns* to his standing as a member of the said St. Patrick Benevolent Society.

Browne for the prosecutor, objected to the sufficiency of this return, upon the ground, that the by-law under which the expulsion took place, was void; and this he said arose, 1st, from its being contrary to the act of the 6th of *April* 1791, 3 *St. Laws* 40, under which the society was incorporated; 2dly, from its being contrary to the charter in many respects; and 3dly, from its making that which was no offence at law, a sufficient offence to amove a corporator.

1st. It is contrary to the act of assembly. The corporation has no legal existence, except for a charitable, religious, or literary purpose. It is obviously charitable. By the 8th article of the charter, each member on signing the constitution pays a sum annually fixed by the society, and at every stated meeting such further sum as may be required by a by-law; and the fund, thus raised, is exclusively applied to the subsistence of members incapable of following their daily employment. To be a valid by-law, it must consist with the object of the incorporation, as sanctioned by the act of assembly. It must assist the charitable design, or, which is the same thing, it must protect the society in the prosecution of its charitable design. But this by-law is merely political. It is to prevent animadversions on each other's conduct, out of doors, and therefore has nothing to do with the charity.

2dly. It is contrary to the charter. The causes of disfranchisement are fixed by the incorporation. The first cause consists, by the 11th article, in neglecting for seven days to inform of the removal of any disability, for which the mem-

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ber has received assistance. The second, by the 13th article consists in quarrelling, drunkenness, insulting or disrespectful behaviour to any of the society &c. while the society is sitting; for which, if a first offence he is to be fined one dollar, if a second two dollars, and for the third he is to be expelled. Here are the causes agreed upon. They exclude all others; and if an extension of the power to expel is wanted, it must be obtained like any other alteration, under the second section of the act. But the by-law not only exceeds, it directly impugns the charter. For insulting or disrespectful behaviour to any of the society, during its sittings, the member is by the 13th article, to be fined for the first offence, and to be expelled only for the third; whereas for vilifying a member, which is the same thing, the by-law expels him in the first instance; that is, by the charter he must repeat a particular offence three times in the presence of the society, before he can be expelled, and by the by-law he may be expelled for committing it once, any where. Here is a manifest repugnance. It is however plainly against the charter, in a third respect. The second article authorises only such by-laws as are needful for the good government and support of the affairs of the corporation. This power implies a negative, that they shall not make by-laws in other cases. *Child v. Hudson's Bay Company (a)*, *The King v. Cutbush (b)*. The by-law has no relation whatever to the good government or support of the affairs of the corporation. It controls the external conduct of members to each other, and might by the same principle regulate their behaviour to the rest of the world.

3dly. The causes for which a corporator may be amoved, are *first* such as have no immediate relation to his office, but are of so infamous a nature, as to render the offender unfit to execute any public franchise; *secondly* such as are against his duty as a corporator; *thirdly* such as are of a mixt nature, against his duty, and also indictable. *Rex v. Richardson (c)*. The by-law does not amove for causes of the second kind; if it embraces any, it does the first. But it cannot be defended upon this ground for two reasons. Vilifying a member is neither an infamous nor an indictable offence; and if it were,

(a) 2 P. Wms. 207. (b) 4 Burr. 2204. (c) 1 Burr. 538.

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it is no cause of amotion until conviction of the offender, whereas the by-law provides for a trial by the corporation. If the offence of a member is indictable, there should be a conviction; if not, it is no cause of amotion. *Bagg's case* (a). Writing a libellous letter to a member, is no cause before conviction. *The Queen v. Lane* (b). A custom to disfranchise for contemptuous words spoken of an alderman is void; it is not against the corporator's duty, and it is no offence at law. *The Queen v. Rogers* (c), *Clerk's case* (d). The principle is distinctly stated in *sir Thomas Earle's case* (e), that a personal offence from one member to another, cannot be a cause of disfranchisement.

But whether the by-law is valid or not, the return is insufficient. It does not appear that the by-law was in existence at the time of the expulsion.

Hepkinson contra. This is the case of a private charitable institution, and not of a town corporate; and what may be needful for the support and good government of the one, may of course be in no manner requisite for the other. The power to make by-laws is limited only by the necessities of the institution. Those necessities vary, as the character and objects of corporations vary; and therefore a by-law of no validity under one incorporation, may be valid under another. All corporations, moreover, possess inherently a power of amotion, for offences that do not involve the breach of a by-law; they also possess the power of amoving for the breach of a by-law; and the latter power may be exercised for a cause, which will not justify the exercise of the former, because the by-law may impose an obligation upon a corporator, which did not exist before. These distinctions explain the cases cited on behalf of the prosecutor. They are cases of municipal corporations, and turn upon the power of amoving for offencees not involving the breach of a by-law.

The question as to the validity of this by-law lies in a narrow compass. The cause of amotion which it declares, comes under the second class of Lord *Mansfield's* enumeration, a breach of the corporator's duty. It prohibits one

(a) 11 Co. 93 b. (c) 2 Salk. 426. 2 Ld. Ray. 777. S. C. (e) Carth. 176.
(b) Fortesc. 275. (d) Cro. Jac. 506.

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member from vilifying another; and the only point is, whether the society had a right to impose such a duty upon the corporators. If they had, they certainly might punish the breach of it by disfranchisement. 4 *Bl. Comm.* 484. They are authorised by the charter, to make by-laws, and to do every thing needful for the good government and support of the affairs of the corporation. The object of the society is to assist persons in distress. It is an association depending for its existence upon the admission of new members, and upon the contribution of such as voluntarily continue to be members. It has no external authority whatever. It can compel no one to become, or to remain a contributor; and the instant that personal abuse and vilification of the members are permitted, that instant the society decays. It lives by union and cooperation. Whatever destroys these, goes to the destruction of the corporation; and therefore a by-law punishing the members for vilification of each other, is needful to the good government and support of the affairs of the corporation. It does not contravene the act of assembly, because it aids the charity. The charity cannot subsist without it. As to its being of a political nature, this is mistaking a possible case under the by-law, for the by-law itself. But the charge against the prosecutor in this instance expressly negatives the suggestion.

Is it then repugnant to the charter? The general position, that if the charter specify certain causes of amotion, all others are excluded, is incorrect. No authority can be adduced to support it; and it would prevent amotion for even an infamous and indictable offence. Besides, the charter does not enumerate the causes of expulsion. It merely says that certain offences may be punished in that way, without using any negative words; and it contains an implication that other offences may be so punished, because the 11th article provides that no member shall be expelled for *any crime whatever*, without notice. I admit that if the offence mentioned in the by-law was the same as the offence in the charter, it could not be punished differently. But it is not. The 13th article is intended merely to preserve decorum during the sittings. The by-law goes deeper, and prevents vilification in public, which is more likely to destroy the corporation. At the same time it does not interfere with the intercourse

between members and strangers, because this in no manner affects the well being of the society.

Then as to the authorities. The case of *The Queen v. Lane* was an amotion under the general power for an offence at law, of which the party should no doubt have been previously convicted. A libel was not against the duty of the corporator at common law, and it had not been made a breach of duty by a by-law. That case also, as well as *The Queen v. Rogers*, *Clerk's case*, and the case of *Sir Thomas Earle*, was the case of a personal offence by one member to another of a town corporation, possessing civil power, and in no manner depending for either existence or success upon the voluntary cooperation of the corporators. Libel and vilification did not endanger these societies, nor had a by-law been passed by either of them, to restrain and punish such offences.

As to the insufficiency of the return, because the by-law is not stated to have been in existence at the time of the expulsion, the return certifies, that the prosecutor was expelled after weighing all and singular the premises, the by-law included.

TILGHMAN C. J. This case arises on a return to a mandamus directed to the St. Patrick Benevolent Society, an incorporated body, commanding them to restore *John Binns* to the rights of a member of the said society. The return is made by *William Duane* president of the society, and assigns the cause for not restoring *Binns*, according to the command of the writ. The question is, whether the by-law, under which the expulsion was made, is valid. In order to determine this, it will be necessary to consider the nature of the corporation. It is an association which has for its object, the raising a fund to be applied to the relief of its members in case of sickness and misfortune, and to the assistance of distressed *Irishmen*, emigrating to the *United States*. Each member pays a certain sum, on admittance to the society, and likewise an annual contribution; and each member is entitled, in case of sickness or distress occasioned by unavoidable accident, to pecuniary assistance from the funds of the society. The second article gives authority, "to make rules, by-laws and ordinances, and do every thing needful for the good government and support of the affairs of the corporation, provided

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“ that the said by-laws &c. be not repugnant to the constitution and laws of the *United States*, to the constitution and laws of this commonwealth, or to the instrument of incorporation.” It may be proper to consider in the first place, whether there existed any, and what power of expulsion, independent of any positive provision in the charter or by-laws. Every incorporation possesses inherently, the power of expulsion in certain cases, because such power is necessary to the good order and government of corporate bodies.— There is a tacit condition annexed to the franchise of a member, which, if he breaks, he may be disfranchised. The cases in which this inherent power may be exercised, are of three kinds.

1. When an offence is committed, which has no immediate relation to a member’s corporate duty, but is of so infamous a nature, as renders him unfit for the society of honest men. Such are the offences of perjury, forgery &c. But before an expulsion is made for a cause of this kind, it is necessary that there should be a previous conviction by a *jury*, according to the law of the land.

2. When the offence is against his *duty as a corporator*; and in that case he may be expelled on trial and conviction by the corporation.

3. The third is an offence of a mixt nature, against the member’s duty as a corporator, and also indictable by the law of the land.

The offence for which *Binns* was expelled, does not come within either of these three descriptions. The expulsion rests solely on the by-law. It has been contended, that this by-law is void, because contrary to the charter in several respects.—First, it is said, that the charter contains an express power of expulsion in certain cases, and thence it is inferred, that such power can exist in no other case. But this inference cannot be supported. It is not expressed in the charter, that there shall be no expulsion except in the specified cases, and in the nature of the thing it is perfectly consistent, that expulsion should take place in the case provided for, and also in such other cases, as the good government of the corporation might require.—In the next place it was urged, that this by-law is contrary to the thirteenth article of the charter, by which it is provided, that in

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order to preserve decorum in the society, while sitting, there shall be no insulting or disrespectful behaviour to any of the society; and any member so transgressing, shall for the first offence be fined in the sum of one dollar, for the second in double that sum, and for the third be expelled the society. A member may be vilified, says the counsel for *Binns*, by *insulting and disrespectful behaviour*; and for that offence, committed in the face of the society, there can be no expulsion, unless repeated again and again. Yet the by-law inflicts the punishment of expulsion for the first offence. If the offences were exactly the same, the argument would be conclusive. And although not the same, the by-law would certainly have been more agreeable to the spirit of the charter, if instead of expulsion in the first instance, the offender had been only liable to a fine and reprimand. But I will not say that it is *void* for this objection. *Vilifying* is a term of very extensive import, and a man may be vilified in his absence, when of course, there can be no personal insult or disrespectful behaviour towards him. The case provided for in the charter, is, from its nature, confined to insulting and disrespectful behaviour in the presence of the party offended. My opinion will be founded on the great and single point, on which the cause turns. Is this by-law necessary for the good government and support of the affairs of the corporation? I cannot think that it is. I have considered the case, with a mind strongly disposed to give a liberal construction to the power of making by-laws. It is my wish to give all necessary powers for carrying into effect the benevolent purposes of this society, and many others which have lately been incorporated on similar principles. But these powers must not be constrained, or the societies, instead of being protected will be dissolved. The right of membership is valuable, and not to be taken away without an authority fairly derived either from the charter, or the nature of corporate bodies. Every man who becomes a member, looks to the charter; in that he puts his faith, and not in the uncertain will of a majority of the members. The offence of vilifying a member, or a private quarrel, is totally unconnected with the affairs of the society, and therefore its punishment cannot be necessary for the good government of the corporation. So far from it, that it appears to me, that

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taking cognisance of such offences, will have the pernicious effect of introducing private feuds into the bosom of the society, and interrupting the transaction of business. I consider it as a point of very great importance, in which thousands of persons are, or very soon will be interested; for the members of these corporations are increasing rapidly and daily. On mature reflection it appears to me, that without an express power in the charter, no man can be disfranchised, unless he has been guilty of some offence, which either affects the interests or good government of the corporation, or is indictable by the law of the land. I am therefore of opinion, that the cause returned by the president of the St. Patrick Benevolent Society, for not restoring *John Binns* to the rights of a member, is insufficient, and that a peremptory *mandamus* should issue.

YEATES J. and BRACKENRIDGE J. concurred.

Rule for a peremptory *mandamus*.

Philadelphia,
Saturday,
March 31.

Lessee of GARDINER against The Schuylkill Bridge
Company.

If the sheriff, upon an *habere facias*, delivers to the plaintiff the proportion that he has recovered in ejectment, and after the return day of the writ the plaintiff ousts the defendant of the whole, the court will not restore the defendant in a summary way.

It seems otherwise if there is an actual ouster before the return day.

THE plaintiff in *December* 1808, obtained a verdict and judgment for one undivided sixth part of a lot, &c. in the possession of the defendants. On the 2d of *January* 1809, he took an *habere facias* returnable to *March*, which was executed on the 4th of *January*; and at *December* term 1809, the sheriff returned that he had delivered possession to the plaintiff of one undivided sixth part of the lot, &c. in the writ mentioned, as by the writ he was commanded.

As early as the 1st of *March* 1809, which was before the return day, the plaintiff agreed with two persons to lease them the *whole* of certain landings and wharves on the lot, for one year, informing them, that although the action was in the name of one, yet he understood from his counsel that the whole was recovered for the heirs of *Peter* and *Sarah*

Gardiner; and on the 6th of *April*, the lease was executed, reserving rent to the plaintiff, and stipulating that the premises should be delivered to him or his representatives at the end of the year.

On the 21st of *September* 1809, the attorney in fact of the defendants attempted to take possession of five sixths; but he was ordered to leave the ground by the plaintiff, who said he claimed and would hold possession of the lot in right of himself and the heirs of *Peter Gardiner*; and upon another attempt on the 2d of *October*, the attorney was kept off the premises by force.

Upon affidavit of these facts, a rule was obtained upon the plaintiff at the last term, to shew cause why the defendants should not be restored to five sixths of the premises in the ejectment; and on this day,

Peters and *Rawle* for the defendants, contended that the process of the court had been abused by the plaintiff, who had colourably used it to take possession of the whole. That he had always entertained the design of taking the whole, because he told his lessees that the whole had been recovered, and before the return day of the writ, contracted to lease them all the wharves and landings. That his claiming possession for other persons was a pretence, for by his lease he reserved the rent to himself, and stipulated for the re-delivery of possession to him or his representatives. That therefore the process of the court had been used to do a wrong to the defendants, by obtaining possession of the whole even before the return day, although no violence was used to keep possession until afterwards. To shew that under these circumstances, the court would do the defendants justice in a summary way, they cited *Roe v. Dawson* (a), *Collingham v. King* (b), *Connor v. West* (c), *Harris v. Fortune* (d), 2 *Eq. Abr.* 123. 1 *Hawk.* 210. c. 33. sec. 12, *Sir Th. Ray.* 275.

Levy and *Tilghman* shewed cause. The plaintiff recovered upon such facts, as gave all the other representatives of *Peter Gardiner* an equal right; and there is no evidence that

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COMPANY.

(a) 3 *Wds.* 49.(b) 1 *Burr.* 629.(c) 5 *Burr.* 2673.(d) 1 *Binn.* 125.

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the bridge company was in possession as against them. If he has taken and kept the whole, he has done it as their agent for five sixths, and they are the parties against whom the rule should be directed. If *A.* disseise *B.* for *C.*, it is the disseisin of *C.* But granting, that the plaintiff has done wrong, this is not the way to redress it. The writ was for one sixth, the possession of only one sixth was given, and so is the return. All the defendants' cases, are of abuse of process at the time of executing it, or of intention to abuse it at the time of taking it out. Here was neither one nor the other. Until long after the process was *functus officio*, possession of the five sixths was not withheld; so that if there has been any wrong, it has not been in abuse of process, and therefore the defendants cannot have a summary redress.

TILGHMAN C. J. If there had been an ouster before the return day of the writ, I should have been for restoring. I mean an ouster in fact; writings are immaterial. But if the plaintiff takes possession rightly under the writ, as he has done here, and after the return day he takes more, the remedy is not summary.

YEATES J. I am of the same opinion. I think there has been management and improper conduct, but the court cannot interfere in this way.

BRACKENRIDGE J. My opinion is that we must look to the conduct of the officer. If the writ has been properly executed, what the party does afterwards, we have nothing to do with in this way. If the officer gives orchard, and the party takes meadow, or commits fifty trespasses before the return, and after possession delivered, the person injured must resort to his action.

Rule discharged.

1810.

COOKSON and WADDINGTON *against* TURNER.Philadelphia,
Saturday,
March 31.

THIS was a foreign attachment to *March* 1796, in which judgment was entered at the third term; but no proceeding had since taken place in the cause. The attachment was laid in the hands of Mr. *Waddington* one of the plaintiffs.

The court will not dissolve a foreign attachment, merely because there has been no writ of inquiry executed for fourteen years, if the delay is accounted for.

Rawle for the defendant, moved for a rule to shew cause why the attachment should not be dissolved, upon the ground of the great delay in executing a writ of inquiry. He said that unless he was entitled to relief in this way, the plaintiffs might suspend the cause for ever, and keep the defendant at bay. For if he brought an action against Mr. *Waddington*, the foreign attachment, so long as it remained upon the docquet, would inevitably defeat him.

Dallas and *Tilghman contra* answered, that the defendant might at any time cure the evil by entering special bail, and that even after a delay of twenty years, this court had not dissolved an attachment, but had directed an indemnity to the garnishee before he paid over the money. 4 *Dall.* 253. That the plaintiffs intended to prosecute the writ of inquiry upon the arrival of certain papers; and that the delay had been caused, first by an understanding with the defendant himself, and afterwards by suits brought against the plaintiffs by the defendant in *Massachusetts* and elsewhere, in consequence of which, the papers necessary upon the writ of inquiry, had been sent to *England* to be proved, where by various casualties they were still detained.

PER CURIAM. We do not see cause to dissolve the attachment, as the plaintiffs have accounted for the delay in issuing the writ of inquiry. If upon the arrival of the plaintiffs' papers from *England*, they neglect to execute a writ of inquiry, there may be ground for the court to interpose.

Rule refused.

1810.

Philadelphia,
Saturday,
March 31.

Bank of North America against FITZSIMONS.

Motion to, with-
draw a case
which had been
stated by three
parties, refused
upon the appli-
cation of one,
notwithstand-
ing one of the
court had given
an opinion in
the cause while
at the bar, and
another was a
stockholder in
the company by
whom the action
was brought.

IN this action a case was stated in 1806, by the plaintiffs, by Mr. *Lewis* as executor of *Benjamin Fuller*, and by *Samuel* and *William Hibbert*, (all of whom had a judgment against the defendant) to decide the right to a sum of money raised under an execution by the bank, and which by the case was agreed to be considered in court.

The Chief Justice had given an opinion, while at the bar, in favour of Mr. *Lewis*; and Judge *Yeates*, being a stockholder in the bank, declined sitting.

Hallowell and *Ingersoll* for Messrs. *Hibbert*, moved to withdraw the case. They said that the situation of the court, was a sufficient ground for the motion, and cited *Price v. Parker* (a), to shew that leave might be given to discontinue after a special verdict, which was an analogous case.

Gibson and *Lewis* *contra* said that the motion could not be granted without consent, which they refused to give. They cited *Boucher v. Lawson* (b), and *Roe v. Gray* (c), to shew that a discontinuance was not permitted after a special verdict, unless there was some strong circumstance in the case itself to entitle the party to a favour.

TILGHMAN C. J. Situated as I am, I shall rely very much upon the opinion of Judge *Brackenridge*.

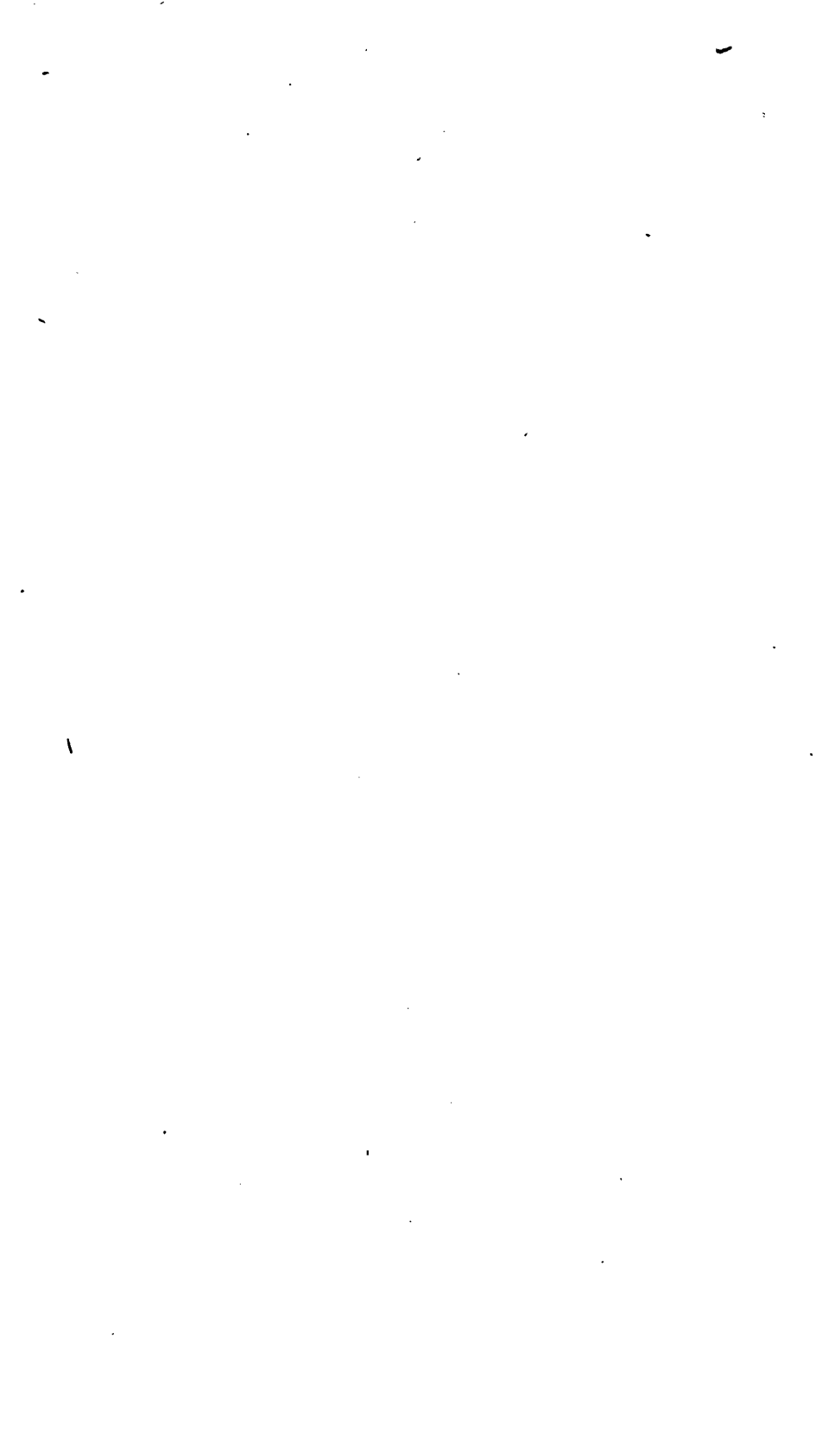
BRACKENRIDGE J. I am decidedly against the motion. It would be a precedent, that would involve us in endless difficulties. That a judge has given an opinion before, is not a cause of challenge; and as the judge who is interested, may qualify himself, I cannot, because he refuses to do it, interfere with the rights of a third person. I cannot answer it to those to whom I am answerable.

Motion overruled.

(a) 1 *Salk*. 178. (b) *Cas. Temp. Hardw.* 194. (c) 2 *W Black.* 815.

END OF MARCH TERM, 1810.





CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

Lancaster District, May Term, 1810.

1810.

Lessee of BURKART and WILLIS *against* BUCHER
and another.

*Lancaster,
Saturday,
June 2.*

THIS was an appeal from the decision of the late Mr. Justice *Smith*, at a Circuit Court for *York*.

The testator, after beginning his will "as touching such worldly estate &c," devised to his son *W*. seventy acres of land, and concluded the devise with these

The cause was tried twice; first, before the Chief Justice in *May* 1807, when a verdict was found for the defendants, contrary to his charge, and a new trial was ordered; and a second time before Judge *Smith* in *May* 1808.

words, "if the said *W*. should chance to die without heir or issue, the above said lands "must fall into the possession of his brother *R*." He then devised certain chattels to *W*. and ordered him to pay 40*l*. to his sister, in four annual instalments; after which, he devised the remainder of his plantation to his son *R*. in the same manner as he had devised to *W*. — *W*. took an estate tail, with a contingent remainder to *R*. upon the event of *W*'s. dying without issue in the lifetime of *R*.

Where the payment of a sum in gross, is annexed to a devise of land in general terms without expressing any estate, the devisee takes a fee. But where the estate of the devisee is plainly indicated, a direction to make such a payment has no effect to alter his estate.

A warrant and survey with payment of the purchase money, is to be considered in *Pennsylvania* in the same light as the legal estate in *England*, and is not to be distinguished, as to conveying, intailing, and barring intails, from estates strictly legal.

The purchaser under a patent from the commonwealth, is bound to take notice of the title recited in the patent, and is affected with notice of what appears on that title, although it is contrary to the patent.

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By the judge's notes the case was this.—The land in question was surveyed in 1737, under a license by *Blunston* to a certain *David Priest*, to whom a warrant of acceptance issued in 1744 for 400 acres. The purchase money was paid to the proprietaries. In 1747, the widow and heir of *Priest* sold two hundred acres to *Henry Willis*, who, on the 13th of *August* 1764, made his will, under which the principal point in the case arose.

The testator began his will, "*as touching such worldly estate wherewith it has pleased God to bless me in this life,*" "I give, devise, and dispose of the same in the following manner and form." He then made certain bequests to his wife, after which came the following devise. "Also, I give to my beloved son *William Willis*, seventy acres of land fronting on *Susquehanna* river, to be taken off the plantation I now liveth on," (the tract bought from *Priest's* representatives,) "with the gristmill and sawmill, and all the improvements that may happen in said seventy acres of land, to be divided with a straight line from the creek called *Yellow Breeches*, to the ferry land line. Also ten acres of meadow ground adjoining on the southeast side of the old meadow, and so extending towards the marsh. If the said *William Willis* should chance to die without heir or issue, the above said lands must fall into the possession of his brother *Richard Willis*. N. B. That *Richard* is left in the care of his brother *William*, till he come to age. I leave the horses and cattle to *William*, but he must give *Richard* his share of them, when *Richard* comes to age."

The testator then gave his daughter *Mary* forty pounds, to be paid by his son *William*, ten pounds when she should arrive at lawful age, and ten pounds *per annum* afterwards until the whole should be paid. He gave a legacy of the same amount to his daughter *Catharine*, to be paid by his son *Richard*, ten pounds when he should arrive at lawful age, and ten pounds *per annum* afterwards until the whole should be paid.

He then concluded his will with the following devise. "Also I give to my beloved son *Richard Willis* the whole remainder of my plantation, with the old dwellinghouse

"and barn, and the old orchard and meadow, and all the improvements that may happen in his part or division of the abovesaid premises. And if the abovesaid *Richard* should chance to die *without heir or issue*, the abovesaid lands and effects *shall fall into the possession of my son William Willis, BY THEM freely to be possessed and enjoyed.*"

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The will was proved on the 26th of *March 1765*, and recorded in the register's office for *York* county.

On the 24th of *April 1778*, *William Willis* the devisee had issue his first son *Henry Willis*, one of the lessors of the plaintiff.

On the 18th of *November 1783*, *William* obtained a patent for the eighty acres devised by his father, (the premises in the ejectment) which granted the land to the patentee *in fee-simple*, reciting that the title was derived under the will of *Henry Willis*.

In *June 1794* he sold a part of the land for 1000*l.*, which he conveyed in fee by deed of bargain and sale, reciting the patent; and in *April 1796* he sold the residue for 900*l.*, which he also conveyed by bargain and sale with the same recital.

Upon the part first conveyed, valuable improvements were made by the purchaser in the lifetime of *William Willis*; and it was sold publicly by the sheriff in *October 1799*, and again at private sale in the year 1800 to *Bucher* one of the defendants, having been previously advertised in the public papers and in handbills.

William Willis died in the autumn of 1799.

During the time when these improvements were made, and at the time of the sheriff's sale and the sale to *Bucher*, *Henry Willis* the younger lived within a mile or two of the premises, and never gave notice of his claim; but it did not appear that he was then cognisant of his title. He told a witness after his father's death, that he thought he had received from his father about thirty dollars of the money; but whether he knew it to be a part of the purchase money at the time was doubtful. He took the benefit of the insolvent laws shortly before his father's death, and made return that he was not entitled to any real estate; at the same time he assigned for the benefit of his creditors, all his property in possession

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and in expectancy to two persons, of whom *Burkart*, the other lessor of the plaintiff was the survivor; but his debts amounted only to 8*l.* 19*s.* 7*d.* and the property in question was worth 10,000 dollars.

The questions were three. 1. Whether *William Willis* took an estate-tail under the will of his father. 2. If he did, then whether it was any thing more than an estate-tail in an equity, which might be barred by deed of bargain and sale. 3. Whether, supposing it to be a legal estate-tail, *Henry Willis* was not barred by the concealment of his claim; or whether the purchasers were to be affected with notice of it, by any thing appearing on the title papers.

The first point was reserved. Upon the second his Honour was of opinion, that if *William Willis* took an estate-tail, it was not barred by his conveyance. The third point, as to the acts and omissions of *Henry Willis*, he left to the jury as a fact; and as to notice of the estate-tail from the title papers, he was of opinion that, the patent being always received as *prima facie* evidence of title, and the person claiming under it not being obliged to produce the prior title, he was not bound to go further back than the patent, by which the estate was recited to have vested in *William Willis* in fee; and therefore he was not to be affected with implied notice by the earlier papers.

The jury found for the defendants; and a new trial being refused, the plaintiff appealed from that decision.

C. Smith and *Duncan* argued for the plaintiff, and in favour of a new trial.

1. Upon the first point, they contended that *William Willis* took an estate-tail. They said, that if a limitation can by any possibility be construed to be a remainder, it shall not be construed an executory devise; and if *Richard* should be considered as taking by way of remainder, then *William* took but an estate-tail; so that the leaning was in favour of the intail. The land is given to *William* generally, with a provision that in case he shall die without heir or issue, then it shall fall into the possession of *Richard*. Heir means the same as issue, because *William* could never die without an heir, while *Richard* was alive; so that the devise is the same as to a man, and if he dies without issue then to another,

which is a clear estate-tail by implication. The testator shews an intent to provide for the issue, which can be done only by giving an estate-tail; and it therefore may well be held that he has given it by implication, with a contingent remainder to *Richard*, to take effect upon the event of *William's* dying without issue in the lifetime of *Richard*. *Denn v. Shenton* (a). *Goodright v. Goodridge* (b). *Nottingham v. Jennings* (c). The direction to pay 40*l.* to his sister, has no effect, for two reasons. It is not annexed to the devise of the land, but follows a devise of chattels amply sufficient to pay it. And if it were annexed, such a direction has never been held to give the fee, where either in express terms, or by necessary implication as here, the devisee took a less estate. In *Denn v. Shenton* such a payment was charged upon the devisee of an estate-tail, and it was not urged even as an argument in favour of a fee-simple.

2. *Henry Willis* the testator was seised of an intailable estate. A survey under a license by *Blunston*, which has always been held as good as a warrant, and the payment of the purchase-money to the proprietaries, give a legal estate. The proprietaries have never been considered as trustees. If they had been, every patentee would hold the land against older rights of which he had no notice; a doctrine that was never asserted in Pennsylvania. Women are dowable of such estates. They pass by the same conveyances as legal estates do in England. They are subject to the same modifications, and are protected by the same remedies. They are therefore intailable within the statute *de donis*. *Lessee of Sims v. Irvine* (d). The deed of *William Willis* of consequence did not bar the issue in tail.

3. The acts or omissions of *Henry Willis* had no effect: first, because he was a minor at the time of the sale and improvements, and was under the control of his father the tenant in tail; secondly, because he had no immediate interest; and thirdly, because there was not a shadow of evidence to shew that he was acquainted with his remote interest. It is perfectly clear that ignorance of title excuses the party

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(a) *Cowp.* 410.
(b) *Willes* 369.

(c) 1 *P. Wms.* 23.
(d) 3 *Dall.* 425.

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from giving notice. 1 *Fonbl.* 151. 1 *P. Wms.* 394 note. *Dyer v. Dyer* (a). But it is immaterial whether *Henry Willis* was ignorant of his title or not. The defendants had notice that they held under a tenant in tail, and notice by the issue was unnecessary. They had notice because their deeds recited the patent, and the patent recited the will which was upon record. Where a purchaser cannot make out a title, but by a deed which leads him to another fact, he is not a purchaser without notice of that fact, but is presumed to be cognisant of it. Whatever is sufficient to put him upon inquiry is good notice. *Dunch v. Kent* (b). *Drapers' Company v. Yardly* (c). *Moor v. Bennett* (d), *Biscoe v. The Earl of Banbury* (e), *Smith v. Low* (f), 2 *Fonbl.* 155. 2 *Pow. on Mort.* 571. The judge therefore misdirected the jury in telling them that the purchasers were not bound to look beyond the patent. They were bound to go from one deed to another up to the license or warrant, and are presumed to have knowledge of every thing appearing upon the papers throughout. Upon this ground we are entitled to a new trial notwithstanding the two verdicts.

As to the hardship upon the purchasers, it is of no consequence. Payment of a full consideration to the tenant in tail is nothing. Even if he covenants to levy a fine, and dies while he is in prison under an attachment from Chancery for not doing it, the issue are not bound. *Fox v. Crane* (g).

Bowie and *Hopkins* for the defendants.

1. *William Willis* took a fee with an executory devise to *Richard*. There are many reasons for supposing that the testator intended to give a fee. First, there are the introductory words, shewing an intent to dispose of his whole interest. Secondly, there is no residuary clause, which shews that it was all disposed of in the first instance. Thirdly, there is a gross sum of 40*l.* to be paid by *William*, which if it was an estate-tail might make him the loser. If it were an express estate-tail, this reason, it is true, would have no weight; but it is

(a) 2 *Cha. Ca.* 108.

(b) 1 *Vern.* 819.

(c) 2 *Vern.* 662.

(d) 2 *Cha. Ca.* 246.

(e) 1 *Cha. Ca.* 287.

(f) 1 *Atk.* 490.

(g) 2 *Vern.* 306.

contended for only by implication, which makes the case different. Fourthly, he gives the whole *remainder of his plantation* to *Richard*, which implies that he had before given a part of his plantation to *William*; and the term plantation passes a fee. *Gulliver v. Poyntz* (a), *Wellock v. Hammond* (b), *Read v. Hatton* (c), *Frogmorton v. Holyday* (d). But what clearly proves that a fee, with an executory devise over was intended, is, that the devise over was to take effect, if ever, during *Richard's* life; it was to fall into his possession; which, at the same time that it brings the devise within the proper limits of a life in being, shews that the testator did not contemplate *Richard's* taking after the expiration of the estate-tail by the indefinite failure of *William's* issue. *Pells v. Brown* (e), *Wealthy v. Bosville* (f), *Fosdick v. Cornell* (g), *Jackson v. Blanshan* (h).

2. If the devise to *William* was an estate-tail, it was but an equitable estate, and the issue were barred by his conveyance. The land was not patented at the time of *Henry Willis's* death. He had but an equity in it, the proprietaries still holding the legal estate in trust for him. It is true that in *Pennsylvania*, to prevent a failure of justice, the *c'estuy que trust* is permitted to use a legal remedy, as to recover possession by ejectment and the like; but the distinction between legal and equitable estates, in all cases, except where if set up, it will, from the want of a court of Chancery, annihilate the equity, is as well established here as in *England*. It is of the utmost importance to the systems of law and equity, that this distinction should be maintained, and that their principles should be blended as little as possible. A warrant and survey, with the payment of the purchase money, give a title sufficient to maintain an ejectment; but that they give a legal title is a very different question. It was not so decided in *The Lessee of Sims v. Irvine*, because there the compact between *Pennsylvania* and *Virginia* was as complete a confirmation of the equitable title as a patent; and it is observable, that the question of remedy in that case

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(a) 3 Wils. 143.

(b) Cro. Eliz. 204.

(c) 2 Mod. 25.

(d) 3 Burr. 1623.

(e) Cro. Jac. 590.

(f) Cas. l'emp. Hardw. 245.

(g) 1 Johnson 440.

(h) 3 Johnson 292.

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turned upon this fact. The true rule is, that they are equivalent to the legal estate, in all cases where it is essential to the existence of the equity that they should be so; but it is not essential that they should be so for the purpose of being intailable within the statute *de donis*, or for the purpose of requiring a common recovery to bar the entail. An entail of a trust is not within the statute. The author of the *Treatise of Equity* says it may be aliened by *any manner of conveyance*; 1 *Fonbl.* 293; and although this may be too extensive a position, yet that it may be aliened by a feoffment or bargain and sale, without the consent of the trustee or remainderman, is held in many cases. *North v. Champernon* (a), *Carpenter v. Carpenter* (b), *Beverly v. Beverly* (c), *North v. Way* (d).

3. The acts and omissions of *Henry Willis* were left to the jury upon the question of fraud, of which they were exclusively the judges. He lived near the land all his life, and he saw the improvements. Even while an infant, his concealment of title would affect him; but he was of full age when the property was sold publicly by the sheriff, and he received from his father a part of the purchase-money. If he knew his rights he is barred. 1 *Eq. Abr.* 256. *Hunsden v. Cheyney* (e), *Raw v. Pole* (f), *Franklin v. Thornbury* (g), *Savage v. Foster* (h), *Goodright v. Straphan* (i). Whether he knew them was also a question for the jury, which they have decided against him. The court will not overthrow the opinion of two juries upon these facts. The question of notice from the title papers, ought not to be settled by the rules adopted in *England*. Conveyancing there is a distinct science, cultivated by learned men, whose counsel is always resorted to. Rules devised for such a state of things, apply with great hardship to the interior of our state, where conveyances are rarely taken upon professional advice. But there is another reason for not implying notice of any thing in the papers beyond the patent. The title emanates from the proprietaries. The patent is their solemn confirmation, which is enough in the first instance to rely upon. It is given upon an examination of the prior conveyances at the land-office; and what it states

(a) 2 *Cha. Ca.* 64.(b) 1 *Vern.* 440.(c) 2 *Vern.* 131.(d) 1 *Vern.* 13.(e) 2 *Vern.* 150.(f) 2 *Vern.* 239.(g) 1 *Vern.* 132.(h) 9 *Mod.* 35.(i) *Comp.* 201.

is so far to be deemed the legal result, as not to leave the party open to the presumption of notice of what is contrary to it in the prior papers.

This is undoubtedly a hard demand. There have been two verdicts against it; and if any mistake has been made in point of law, it has not been against the honesty and equity of the cause. It is therefore not a proper case for a new trial. *Deerly v. Dutchess of Mazarine* (a), *Smith v. Page* (b), *Dunkly v. Wade* (c), *Farewell v. Chaffey* (d). After a discontinuance, the issue in tail are never assisted in Chancery. *Kelley v. Berry* (e), *Bunce v. Phillips* (f).

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TILGHMAN C. J. The first question in this case is, what estate passed to *William Willis*, by the will of his father *Henry Willis*?

The testator having declared his intention to dispose of the whole of his estate in the beginning of his will, devised to his son *William* in the words following. (Here the Chief Justice read the devise to *William*.) After this, follow several devises and bequests, among which is one by which part of the personal estate is given to the said *William*. A legacy of 40*l.* is then given to the testator's daughter *Mary*, to be paid by the said *William* by instalments. The remainder of the land is then given to his son *Richard* in the following terms. (The Chief Justice then read the devise to *Richard*.)

If the devise to *William* is abstracted from the rest of the will, it must be considered as an estate-tail by direct and necessary implication. There are no words of limitation annexed to the gift to him, nor is it expressed to be for his life, nor is there any express devise to his issue; but the estate is not to go over to *Richard*, unless *William* should die without issue. Here is a plain intent to provide for the issue, which can no otherwise be effected than by vesting an estate-tail in their father. But there is not the least intimation of an intent to give a fee-simple. Failing issue of *William*, the land is to go to *Richard*.

It is contended however on the part of the *defendants*, that by considering this devise to *William* in connexion

(a) 2 *Salk.* 646.(c) 2 *Salk.* 653.(e) 2 *Vern.* 35.(b) 2 *Salk.* 644.(d) 1 *Burr.* 54.(f) 2 *Vern.* 50.

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with other parts of the will, it will appear that a fee-simple was intended for him, with an executory devise to *Richard*, to take effect on the contingency of *William's* dying without issue, in the life of *Richard*. The parts relied on, to shew this intent to give a fee-simple, are the introductory words of the will, expressing a design to dispose of the whole estate, and the legacy of 40*l.* to be paid by *William*. These introductory words have been more or less regarded by different judges. I will not say, that they are not to carry some weight in doubtful cases; but I am not disposed to allow them much consequence, where it is pretty clear from the other parts of the will, that an estate less than a fee-simple is intended; because, I believe, that in most cases the testator has a general intent to dispose of his whole estate, whether he says so in the beginning of his will or not. If however this intent of disposing of the whole estate is to have any effect, it will be best applied to the devise over to *Richard*, in case of *William's* death without issue; for in such case, it is to be supposed that the testator intended to give a fee. This supposition is strengthened by adverting to the devise of the remainder of his plantation to *Richard*, and if he should chance to die without issue, then to fall into the possession of *William*, *by them freely to be possessed and enjoyed*. These expressions, "freely to be possessed and enjoyed," shew a strong intent to give a fee, and have been adjudged sufficient to convey it. It may be concluded then, that in the devise over, in both instances, the testator meant to give a fee. As to the payment of 40*l.*, if it had been annexed to the devise to *William*, and if there had been no expression in the devise to *William*, shewing an intent to give an estate-tail, then indeed, under the authority of adjudged cases which have been cited, and from the reason of the thing, independent of authorities, *William* would by virtue of that payment have taken an estate in fee-simple; because it is presumed, that by every devise it is intended to confer a benefit on the devisee; and it might happen that the payment of a sum of money might be an injury instead of a benefit, if the devisee took an estate less than a fee. But although this argument is satisfactory, where a devise is made in general terms without expressing any estate, yet it has

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no weight in cases where the estate of the devisee is plainly indicated; because the devisee has no right to claim a greater estate than the testator intended for him, and if he dislikes the conditions, he may refuse the devise. Besides, the payment of 40*l.* is not annexed to the devise of land to *William*; but between the devise of the land and the direction to pay the money, a bequest of personal property to *William* intervenes, so that we cannot say that the testator ordered *William* to pay the money in consideration of the devise of the land. Much stress was laid by the defendants' counsel on these expressions—"the above lands must fall into the possession of his brother *Richard*." From hence they inferred, that the estate given to *Richard* was to take effect on a contingency to happen *during his life*, and not after an indefinite failure of issue of *William*. Without deciding on the accuracy of this construction, it is sufficient to remark, that supposing it to be just, it by no means follows that *William* was to take an estate in fee. It is quite consistent that *William* should take in *tail*, with a contingent remainder to *Richard*, to take effect on *William's* dying without issue in the life of *Richard*. Considering this will in all its parts, I am of opinion that *William* took an estate-tail in the land devised to him.

2. The next question is, has this estate-tail been barred? The defendants say it has, although no common recovery was suffered; because *Henry Willis*, whose will is dated in the year 1764, was not seized of a *legal* estate, but only an equitable one, the legal estate not having been at that time granted by the proprietaries of *Pennsylvania*. Cases were cited to prove that the statute *de donis* does not extend to equitable estates; and that in such cases the issue are barred by the deed of their ancestor without common recovery. I think it unnecessary to consider those cases, because in this state a warrant and survey, attended with the payment of the purchase-money, (which was the case here) is to be considered in the same light as the legal estate in *England*. We have no Court of Chancery to compel a specific performance of contracts, so that we have been in the habit of considering that as done, which Chancery would compel to be done. It has always been supposed that estates of this kind are not to

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be distinguished as to the mode of conveying them, from estates strictly legal. This was the opinion of the learned and respectable judge, before whom this cause was tried in the Circuit Court, and I fully agree with him.

3. I will now consider the third point in this cause. It was strongly urged in the Circuit Court, that supposing the estate-tail not to have been barred, the *plaintiff* ought not to recover, because he had assented to the sale made by his father, and had given no notice of his title to the *defendants*, who are purchasers for a valuable consideration without notice. On the other hand, it was contended on the part of the plaintiff, that the defendants could not be considered as purchasers without notice, because they claim under a deed, which recites the patent to *William Willis*, and the patent refers to the will of old *Henry Willis*, by which the estate-tail is created. The learned judge who tried the cause was of opinion, that the purchasers were not bound to look further back than the patent, and no doubt this opinion must have had great weight with the jury. This is a principle of very great importance, considering the vast mass of property which is held without patent in this commonwealth. It may have very extensive and alarming consequences, if every purchaser from a patentee is to be considered as having no notice, and not bound to take notice of any thing prior to the patent. In cases like the present, where the prior title is referred to in the patent, there is no reason why the purchaser should not take notice of it. The will of *Henry Willis* was recorded, and it was the fault of the purchasers not to examine it. Why should the son of *William Willis* be barred of his estate, because the purchasers under his father neglected to look into a will to which their title deeds referred them? The cases cited for the plaintiff prove, and indeed the defendants' counsel do not deny, that by the principles of the common law, the purchaser in such cases is bound to take notice; but they say that those principles ought not to be extended here, because in this country the business of conveyancing is transacted by ignorant people. I cannot give my assent to this argument. If admitted in this case, it will be urged in every other, till at length all principles will be

prostrated under the plea of ignorance. It appears to me, that on this point the jury were misdirected in point of law.

4. The last question is, whether under these circumstances a new trial should be granted? Against a new trial it is urged, that this is a *hard* case, in which there have been two verdicts for the defendants. I perceive that it is a hard case, and I am extremely sorry for it. It is always hard on a man, who has the misfortune to purchase a bad title. But I must not suffer my feelings for the defendants to carry me so far as to do injustice to the plaintiff. If the cause had gone to the jury, in the manner which I conceive it ought by law to have been submitted to them, I should have been against a new trial. It must be a very extraordinary case indeed, in which I could be induced to give my opinion for a new trial, after two verdicts on matters of fact. But that is not the present case. I can have no assurance that the jury would have found the same verdict, under a different direction as to the point of law which has been mentioned. I must therefore, with reluctance, give my opinion, that this court cannot without injustice refuse the plaintiff a new trial.

YEATES J. concurred with the chief justice upon all the points.

BRACKENRIDGE J. was of the same opinion.

New trial granted.

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Lessee of GALLOWAY against OGLE.

When a claim, set up by a third person to a warrant and survey, remains undisputed for the space of between thirty and forty years, and there is nothing to shew that the warrantee has transferred his title to any one else, it is strong evidence to prove that the right of the warrantee vested in the claimant, by some conveyance which is lost.

A tenant cannot resist his landlord's recovery, by virtue of an adverse title, acquired during his lease.

The copy of a list of lands belonging to a person deceased, made out fifty years before the trial by his executor who is also deceased, is not evidence; nor would the original be, if produced.

THIS was an appeal from the decision of Judge *Brackenridge* at a Circuit Court for *Dauphin*.

It was an ejectment for a tract of land, under the following circumstances: The plaintiff claimed under a warrant to *David M'Nair* for 100 acres, dated the 23d of *August 1742*, upon which a survey of 398 acres and a half was made in *October 1743*, as appeared by the notes of the deputy surveyor, although the survey was not returned. This survey was claimed by *Thomas Cookson*, who by his will dated the 15th of *March 1753*, devised his estate to his wife and children. *Galloway*, the lessor of the plaintiff, married one of *Cookson's* daughters, and in 1762, on a partition of *Cookson's* estate, the premises in the ejectment, being the survey under *M'Nair's* warrant, were allotted to *Galloway* and wife, and possession delivered to them by the sheriff. *Galloway* afterwards acquired in fee-simple all the estate of *Cookson* in this land. Before and up to the 27th *November 1773*, *Thomas Ogle* the father of the defendant held the premises under a lease from *Galloway*; and on that day *Galloway* contracted with *Henry Weaver* to sell him the land, but no conveyance was to be made until payment of the purchase money. *Weaver*, being in possession under *Galloway*, in the year 1781, made an improving lease for seven years to *Ogle*, who covenanted to perform the terms &c., and to deliver up possession at the end of his lease. The purchase-money not being paid by *Weaver*, *Galloway* brought an ejectment against him in 1793, upon which he obtained judgment in 1800, and then brought the present ejectment.

In order to prove that *Cookson* was entitled to *David M'Nair's* warrant, the plaintiff offered in evidence the deposition of *Richard Peters*, together with a paper annexed, purporting to be the copy of "a list of lands of Mr. *Cookson* taken from his papers on the 28th and 29th *March 1753*," in which the warrant of *M'Nair*, and a deed-poll from him to *Cookson* on the 14th *October 1744* were mentioned. On

this paper was a certificate by *Benjamin Chew*, esq., that the indorsement on the original paper (which together with the deed-poll was lost) was in the handwriting of the reverend Dr. *Richard Peters* deceased, who was the executor of *Cookson*; and the deposition stated that the certificate subjoined to, and the indorsement on this copy were in the handwriting of Mr. *Chew*, and that the witness had a recollection tolerably perfect of the original paper, which he had seen in the handwriting of his uncle the said *Richard Peters* deceased, and verily believed the transcript thereof as certified by Mr. *Chew*, to be a true copy.

This deposition and paper were objected to, and overruled by the court.

The defendant set up the following title. In *October 1784*, while *Ogle* was in possession under *Weaver*, he purchased the right of *Dunning* and *John M^cNair*, who set up a claim in right of *David M^cNair* to the original warrant; but there was no proof that they were the heirs of *David M^cNair*, nor was there any evidence by which a title could be deduced from *David M^cNair* to them. A warrant of resurvey for 90 acres and one quarter was taken out in the same year on *David M^cNair's* warrant of 1742; and in 1797 *Ogle* took out a warrant for 109 acres including a supposed improvement in 1745, adjoining the lands of *Joseph Galloway* and others, upon which a survey of 109 and a half acres was made in the same year. These two surveys, which were part of the 398 acres claimed by *Cookson*, were patented to *Ogle* on the 20th of *April 1797*, the patent reciting that the title to part was derived from *David M^cNair*. On the death of *Ogle*, the defendant his son took the land upon a valuation; but there was no proof that he had paid any money upon it.

The plaintiff's counsel contended. 1. That no person except *Cookson* and those under him having set up any pretensions to *David M^cNair's* warrant from 1742 to 1784, there was a violent presumption that it had been conveyed by *M^cNair* to *Cookson*, by some instrument that was lost; and that this was all that was wanting to make the plaintiff's title indefeasible. 2. That without regard to title, there was positive evidence of uninterrupted and undisputed posses-

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sion in *Cookson* and the lessor of the plaintiff, from 1753 to 1777, which was sufficient to entitle the plaintiff to recover in this action against a defendant who had no title. 3. That so much of the defendant's claim as was pretended to spring from *David M'Nair*, was entirely without foundation, because no right was deduced from him to *Dunning* and *John M'Nair*, of whom the defendant's father bought, and the recital in the patent availed nothing against the plaintiff; and that as to the residue, the supposed improvement in 1745 was a fiction, and *Ogle* knew that the land was covered by *M'Nair's* warrant. 4. That whatever might be the state of the titles, it was not competent to *Ogle*, who had been the tenant of *Galloway*, and was the tenant of *Weaver* the representative of *Galloway* at the time he bought the adverse title, to deny his landlord's title. And 5. That the defendant did not stand in the light of a purchaser without notice, because he had paid no part of the valuation upon which he had taken the land; but that he stood precisely in the situation of his father, and was equally estopped from controverting the plaintiff's title.

The counsel for the defendant answered, 1. That the survey not having been made for *Cookson*, nor any knowledge of, or assent to, his claim, brought home to *David M'Nair*, the lapse of time furnished no evidence of a transfer by *M'Nair*. 2. That the possession, which went no further back than 1762, when it was delivered to *Galloway* under the partition, was not sufficient by itself, because it had been given up to *Weaver*, and because the defendant had title. 3. That the recital in the patent was evidence to shew that the *M'Nairs* who sold to *Ogle*, had a right to *David M'Nair's* warrant, because that fact must have been proved at the land-office; and that the improvement was a good foundation for the warrant and survey in 1797. 4. That *Ogle* was not precluded from purchasing an adverse title, although he might have been estopped from setting it up during his lease; but that this objection could not hold, as the ejectment was not brought until long after the lease expired. And 5. That the defendant was in a better situation

than his father, having taken the land at a valuation, and agreed to pay for it, without notice of *Galloway's* claim.

The jury found for the defendant; and a motion for a new trial being overruled, the plaintiff appealed.

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The cause was here argued by *C. Smith* for the plaintiff, and by *Duncan* for the defendant, upon the same points that were made below, together with the point of evidence, which the plaintiff's counsel contended had been erroneously ruled by his Honour.

TILGHMAN C. J., after stating the facts, delivered his opinion as follows:

The title of *Cookson* having been regularly deduced to *Galloway*, there was nothing to prevent his recovery but the want of a conveyance from *David M'Nair* the original warrantee to *Cookson*. But there was no evidence of any claim under *M'Nair* adverse to *Cookson*, being set up, till the year 1784; nor was there any evidence (except the recital in *Ogle's* patent) that the title set up in 1784 was legally deduced from *David M'Nair*. The recital in that patent, although conclusive between the commonwealth and the patentee, has no weight against third persons claiming under a title adverse to the patent. Considering that estates held by warrant and survey, were in former times looked upon as *personal* property, and subject to alienation with less form than patented lands, that *Cookson* had possession of this land at a very early period, and that *Galloway* had the possession under *Cookson's* title formally delivered to him on a writ of partition, so long ago as the year 1762, there appears great reason to suppose that the right of *David M'Nair* had been vested in *Cookson*, by some writing which may have been lost. If this had not been the case, it is difficult to account for the long and uninterrupted possession by *Cookson*, and those claiming under him. But the plaintiff's case does not rest solely on this presumption. It was improper conduct in *Thomas Ogle* to retain possession under a title adverse to the lease under which he obtained possession. He had a right, to be sure, to purchase any title that he pleased; but he ought in strict morality to have given up the possession, according to contract, at the end of his lease, and then

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brought his ejectment under his own title. It has been decided, and is the settled law of the country, that a tenant shall not resist the recovery of his landlord, by virtue of an adverse title acquired during his lease. This principle is founded on sound policy, because it tends to encourage honesty and good faith between landlord and tenant. The present case is not precisely what I have mentioned, because *Thomas Ogle* did not take his last lease from *Galloway*, but from *Weaver*. There is evidence indeed of his confessing that he held under *Galloway* before he took the lease from *Weaver*, but that was before he made the purchase of *M. Nair*. There is no occasion to give an opinion, whether under these circumstances the defendant should be *precluded* from disputing *Galloway's* title in this ejectment. But it is certain, that the manner in which *Thomas Ogle* came into possession is a fact entitled to considerable weight. From that circumstance, in conjunction with others which I have mentioned, it appears to me that the weight of evidence was so greatly against the verdict, that the justice of the case calls for a reconsideration. I am therefore of opinion that a new trial should be granted.

There was a point of law which arose on the trial, respecting the admissibility of the deposition of *Richard Peters* as evidence; I have not thought it necessary to enter into that point, but my opinion is, that the deposition was very properly rejected.

YEATES J. One of the reasons of appeal urged in this case was, that the Circuit Court overruled the deposition of *Richard Peters*, esq. taken in pursuance of a rule of court, and the paper referred to therein.

It is clear to me, that if the original paper indorsed by Dr. *Peters* had been produced on the trial, and fully proved to have been written by him, the same could not have been received in evidence; because it would amount to no more than the written declaration of a person, now deceased, that he had seen such papers and examined them. It would be mere hearsay without oath, and could not be admitted to establish the fact of the existence of a conveyance of the warrant-right in the year 1753. It necessarily follows, that

a copy being a further remove from the fact thus attested could not be received; and the deposition of *Peters* only goes to shew that he believes the transcript to be a true copy of the original paper, not that he himself had seen the deed-poll referred to therein. I have no doubt that the deposition and paper were properly overruled.

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Whether a nonassertion of title by *M'Nair* the warrantee and the persons asserting themselves to be his heirs, for the period of forty years and upwards, might not justify the inference either that he had released his right, or that he was a bare trustee for *Cookson*, was a fact which the jury could decide. It was certainly a strong circumstance operating against the defendant's pretensions. But the plaintiff's counsel have contended, that he was entitled to recover under the circumstances of this case on his prior possession; and it is certain, that there is a *jus possessionis* as well as a *jus proprietatis*, which in many instances will entitle the party to a verdict in ejectment. *Vaugh.* 299. *Cro. Eliz.* 437. 2 *Johns.* 22.

[Judge Yeates then stated the facts and proceeded as follows:]

Under this statement of facts the question occurs, whether the plaintiff was entitled to recover? No rule of law is better settled, than that a tenant shall not dispute the title of his landlord. It is manifestly against good faith, and tends to great immorality. Neither shall a mortgagor dispute the title of the mortgagee. The tenant coming into possession under his landlord, ought to surrender it up when his lease is expired. The latter may enter upon the former when the term is ended, and may justify it in trespass under the plea of *liberum tenementum*; though if he dispossesses him by force and with a strong hand, he may be indicted for a forcible entry. The tenant, by the practice of the *English* courts of equity, cannot compel his landlord to interplead, unless where the claim of a third person arises by the act of the latter subsequent to the lease. Tenants who hold over their terms will not be permitted to set up a title in a third person against their landlords, whose titles they had acknowledged, and held under by their leases. *Colles' Parl. Cas.* 122. The same principle of reason and sound policy equally applies in the cases of other persons claiming

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or coming into possession under such lessees; and it is observable that our act of assembly of the 21st March 1772 gives the same summary remedy in either instance. 1 *Dalh. St. Laws* 617. Nothing under sect. 13. of that act shall prevent a restitution of the demised premises, "but a right " or title accrued or happening since the commencement of " the lease, by descent, deed, or from or under the last will " of the lessor." 1 *Dalh. St. Laws* 618. And in this particular the provisions of this act correspond with the rule adopted in Chancery in *England*, as to the right of the tenant to oblige his landlord to interplead. In the case of *Jackson v. Harder*, *Kent* chief justice delivered the opinion of the Supreme Court of *New York*, that a plaintiff in ejectment shewing a possession of eight or ten years, under a claim and colour of title, was entitled to recover. It was clear beyond all doubt, said he, that the party who entered and held under the plaintiff, would be concluded from setting up any adverse title, and any person who succeeded to the possession under him would be concluded. The defendant there was either an intruder, or he entered under the plaintiff's title; and in either case, he was precluded from questioning the plaintiff's right of possession. 4 *Johns. Rep.* 210. 211. The late recovery in *Philadelphia* by Dr. *Gardiner* against the Schuylkill Bridge Company, was founded solely on the right of possession. The defendant's father first came into possession as the tenant of *Galloway*, and afterwards became the tenant of *Weaver*, to whom *Galloway* agreed to sell, but reserved the title in himself till the terms of sale were complied with. That contract being rescinded, he continued to be the tenant of *Galloway*. The interest of the warrantee was not deduced to him, if it was even competent to him to set it up against his landlord. The son can be in no better situation than his father; and upon the whole matter I am of opinion, that a new trial should be awarded, and that the costs of the former trial should await the event of the suit.

New trial awarded.

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CARSON *against* BLAZER and others.Lancaster,
Saturday,
June 2.

TRESPASS *quare clausum fregit*. The declaration stated that the defendants, "on the 10th day of *April* 1803, "with force and arms &c., broke and entered the close of "the plaintiff in the river *Susquehanna*, in the township of "lower *Paxton* in the county of *Dauphin*, and trod down "his grass to the value of ten dollars there growing, and "broke and entered into the *several fishery* of the plaintiff "in the said river, in the township and county aforesaid, "and then and there took 1000 shad of the value of two "hundred dollars, and other wrongs did &c., to the plaintiff's damage three hundred dollars." Plea, Not guilty, with leave to justify.

The common law doctrine, that fresh water rivers in which the tide does not ebb and flow, belong to the owners of the banks, has never been applied to the *Susquehanna*, and other large rivers in *Pennsylvania*. Such rivers are navigable, although there is no flow and reflow of the tide, and they belong to the commonwealth. No one therefore has a right to an exclusive fishery therein, on the principles of the common law, nor has such a right been granted to any one by the proprietaries or by the commonwealth.

On the trial before the Chief Justice at *Harrisburg* in *April* 1807, the plaintiff deduced a title to himself from the late proprietaries, by warrant of 24th *September* 1736, for 228 acres of land adjoining the *Susquehanna*, and immediately opposite to the fishery in question. The patent under which he held, stated the tract to begin at a birch tree *by the river*, thence by certain courses and distances to a red oak *by the same river*, and thence *by the same* the several courses thereof, to the place of beginning; no part of the land in the bed of the *Susquehanna* being expressly covered by the patent. The brother of the plaintiff, who was the former proprietor of the land, first cleared out a pool for a shad fishery between his own shore and a sand-bank in the river about 200 yards distant, in the year 1773; and afterwards fished there. *Blazer*, one of the defendants, made some further clearing in the pool near the sand-bank in 1796, and he and his sons fished in it from the sand-bank, at first without any opposition by the plaintiff; but he afterwards told them to desist, and brought the present action for drawing their seine in the pool, in the spring of 1803. There was but one pool or fishing place between the plaintiff's shore and the sand-bank. A net of the usual length would sweep the whole of it; and one of the witnesses swore that the defendants, in drawing their seine, came within fifteen or twenty yards of the plaintiff's shore.

Quere, whether a custom that the owners of the banks of the *Susquehanna* shall have an exclusive fishery in the river opposite to their shores, is good? Vide *Noy*. 20. *Bro. Abr.* "Pre-*scription*." pl. 71. The concessions or conditions of William Penn, 11th July 1681, are confined to the first purchasers, and persons claiming under them.

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Upon these facts the material question was whether the plaintiff had an exclusive fishery in the *Susquehanna* opposite to his land, and on this point the Chief Justice charged the jury in substance as follows:

TILGHMAN C. J. If the plaintiff has an exclusive right, it must be founded, either 1. on a grant from the late proprietaries, or 2. on prescription, or 3. on the principles of the common law adopted in this country.

1. King *Charles* the second granted to *William Penn* the soil of *Pennsylvania* and the rivers within its limits, together with the fishing of all sorts of fish within the premises, and the fish therein taken. *William Penn* has not granted the plaintiff any right of fishery, nor has he granted him any thing beyond the margin of the river. The proprietary asked no higher price for river lands than others. No doubt he retained the entire right of the river and of every thing in the river, in order that he might make such use of it, as would be most conducive to the public benefit; and he afterwards, at least as far back as the 9th of *May* 1771, gave his assent to an act of assembly, declaring the river *Susquehanna* a highway, and regulating its fisheries in such a manner as to be inconsistent with an exclusive right in any person whatever. The *fourth* and *sixth* articles of *William Penn's* concessions are urged as a grant (a). But it appears to me that these concessions are confined to the first purchasers; for there are several things therein agreed to be done by those first purchasers, which cannot be said to be binding on any subsequent purchasers. There are also other grants, as for instance to servants in the *seventh* article, which must

(a) Article 4th. That where any number of purchasers more or less, whose number of acres amounts to 5 or 10,000 acres, desire to set together in a lot or township, they shall have their lot or township cast together in such places as have convenient harbours or navigable rivers attending it, if such can be found.

Article 6th. That notwithstanding there be no mention made in the several deeds made to the purchasers, yet the said *William Penn* does accord and declare that all *rivers*, rivulets, woods and under woods, waters, watercourses, quarries, mines, and minerals, (except mines royal) shall be freely and fully enjoyed, and wholly, by the purchasers into whose lot they may fall.

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be confined to the original emigrants; and there are stipulations and agreements in a great number of the articles, as in the 3d, 4th, 7th, 8th, 10th, 11th, 12th, 14th, 17th, 18th, and 20th, which must be limited in the same way. Now I give no opinion as to the rights of those first purchasers, and persons claiming under them. The plaintiff is not of that description.

2. No proof whatever has been given of any thing like prescription, either in the plaintiff in particular, or in general in those persons who hold lands adjoining the *Susquehanna*. The first time the plaintiff used this fishery was in 1773, when he cleared away the stones which impeded his seine.

3. The plaintiff relies principally on that rule of the common law, by which rivers, wherein the tide does not ebb and flow, (which are *not navigable*) belong to the owners of the adjoining lands on each side. This common law right, if even it was properly applicable to the *Susquehanna* and *Delaware*, and other large waters, was not deemed proper for this country, nor was it adopted, up to the period of our revolution; because, the several acts of assembly before that time, declaring these rivers to be highways, and regulating the fisheries in them, are incompatible with the common law right; and *since* the revolution, no part of the common law has been adopted except that which was proper for our country. But the common law principle concerning rivers, even if extended to *America*, would not apply to such a river as the *Susquehanna*, which is a mile wide, and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in *England*, no such law would ever have been applied to it. Their streams, in which the tide does not ebb and flow, are small.

But there is another objection to the adoption of this principle. The common law gives to each proprietor one half of the river adjoining his shore; and if this doctrine is applied to the *Susquehanna*, every owner of the bank must own all the *islands* nearest to that bank; a right never contended for.

The common law principle is in fact, that the owners of

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the banks have no right to the water of *navigable* rivers. Now the *Susquehanna* is a navigable river, and therefore the owners of its banks have no such right. It is said however that some of the cases assert, that by navigable rivers are meant, rivers in which there is no flow or reflow of the tide. This definition may be very proper in *England*, where there is no river of considerable importance as to navigation, which has not a flow of the tide; but it would be highly unreasonable when applied to our large rivers, such as the *Ohio*, *Allegheny*, *Delaware*, *Schuylkill*, or *Susquehanna* and its branches.

The inconvenience of common fisheries is urged. The only question is whether the plaintiff has an exclusive right; if he has not, he cannot recover. But in point of inconvenience, we are upon the same footing with the navigable waters of *England*; the public may make what regulations they please, by law.

Upon the whole matter, I am of opinion that the owner of land on the banks of the *Susquehanna*, has no exclusive right to fish in the river immediately in front of his lands, but that the right to fisheries in that river is vested in the state, and open to all; of course, that the plaintiff cannot recover.

The jury found a verdict for the defendants; and a new trial, which was asked for upon the ground of misdirection, being refused, the plaintiff appealed to this court.

C. Smith and *Duncan* argued for the appellant, and in favour of a new trial. They contended that he was entitled to an exclusive right of fishery in the river opposite to his shore, 1. on the principles of the common law; 2. by the grant of the first proprietary; and 3. by the custom of *Pennsylvania*.*

* In the course of their argument, the counsel for the appellant offered to read *ex parte* depositions taken after the trial, to prove a general custom of the country for owners of the banks of the *Susquehanna*, to enjoy an exclusive fishery in the river opposite to their banks. But the court overruled the depositions, upon the ground that new evidence was inadmissible upon an appeal from the Circuit Court.

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1. The *Susquehanna* is well known to be a fresh water river, in which there is no flow and reflow of the tide; and which, therefore, although navigated by boats of a certain description, as almost every stream of water may be, does not come within the legal definition of a navigable river. By the common law, fresh water rivers, in which the tide does not ebb and flow, belong to the owners of the adjacent soil.

Harg. Law Tracts 1. Where the river is an arm of the sea, or where the tide flows and reflows in it, then and then only is it a royal or navigable river, belonging to the king.

Davys's Rep. 55, (152). In waters of the latter description,

an exclusive right of fishery cannot be maintained by the proprietors of the banks; the right is common to all. But in those of the former kind, the proprietors of the land have the exclusive right of fishery on their respective sides, extending generally *ad filum medium aquæ*.

Carter v. Murcot (a), *Lord Fitzwalter's case (b)*. 1 *Swift's System* 340-3.

There can be no doubt that by the common law, the plaintiff is entitled to an exclusive fishery in the river opposite to his bank. Has this part of the common law been rejected by the state of *Pennsylvania*? We contend that it has not. This principle of that law is founded in the wisest policy. Its object is to assign an exclusive proprietor to every thing susceptible of such ownership, and to leave as little as possible in common, to become the source of contention and violence.

2 *Black. Comm.* 261. Its application does not depend either upon the breadth or depth of the stream. It is a substantial rule of property, as much as any part of the common law by which we hold our estates, and embraces all waters which are not navigable within the meaning of that law. The right to the water and the fishery passes as an incident to the ownership of the land. It is the common law effect of a grant of land so situated, to carry with it this right, unless restrained by express words, of which there is nothing in the plaintiff's patent; and so indeed it was decided with respect to a fishery on the *Susquehanna* in the case of *Erving v. Houston (c)*.

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2. The concessions of *William Penn* are in affirmance of the common law principle. Some of the articles appear to be

(a) 4 *Burr.* 2164.(b) 1 *Mod.* 105.(c) 4 *Dall.* 67.

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of temporary and limited application; but there is nothing in any of them which confines their operation to the first purchasers. The fourth article in particular embraces all who at any time might become purchasers, conferring a permanent privilege upon them; and the sixth is not so much a grant, as a rule of construction which the proprietary agrees shall be applied to his deeds to whomsoever made; that is, whether the deeds mention it or not, rivers and waters shall be fully and wholly enjoyed by the purchasers into whose lots they fall. It cannot be that the meaning of *William Penn* was merely to give an exclusive right of fishery &c., where the waters fell expressly into the survey of the purchaser, or in other words, where the land covered by water was sold and expressly embraced by the survey; for in such cases the concession was superfluous. It must have been intended to preclude all question as to the purchaser's right, where the land was sold adjacent to the water.

3. The usage of *Pennsylvania* must be so well known to the court as to require no proof. Since the first settlement of the province, fisheries have been uniformly sold and disposed of as exclusive property; and the acts of the legislature which are thought to be incompatible with the right, do affirm it. Until the 9th of May 1771, the *Susquehanna* was not a highway even for passing and repassing. By a law of that date, that river and others were declared highways; but to exclude the supposition that the right of fishery was negatived by the law, they are declared to be highways "for the purposes of navigation up and down the same," and no further. 1 *St. Laws* 557. The practice of fishing in those rivers is expressly recognised; and only so far as is necessary to preserve and improve the navigation is that right affected. The act of 6th March 1793, 3 *St. Laws* 310, is still more in our favour. Sand-banks in the river, being purchased solely to interfere with fisheries from the opposite shore, are by that law prohibited from being sold; and the value of such cultivable islands as are left open to purchasers is directed to be ascertained, not only by taking into view soil and situation, but "the advantage that may be derived from the same in regard to fisheries;" a clear recognition than an exclusive right of this kind would go to the purchaser. Islands themselves

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would have gone by the common law to the proprietor of the nearest shore; but to guard against this, it was the custom of the proprietaries to issue warrants for the survey of all islands, before they opened the land-office for the public. But the last act upon the subject of fisheries in the *Susquehanna* is of itself decisive of the usage. It defines a pool or fishing place to be that space from the place where nets have been *usually* thrown in the water, to the place where they have been *usually* taken out. It compels persons who live on opposite shores, and have but one pool or fishing place between them which may be swept by one net, to fish alternately once every other day. It prohibits more than one seine from being drawn in a pool once in twenty-four hours; and it punishes all who undertake to fish contrary to the provisions of the act. *Act of 16th March 1807. 8 St. Laws 74.* It is difficult to imagine stronger evidence, both of the custom, and of the illegality of the common right now set up.

Hopkins for the defendants. The whole argument upon the common law turns upon a definition, which however correct in *England*, cannot be defended for a moment in the *United States*. Those rivers alone are navigable, says the common law, in which the tide ebbs and flows; and all rivers that are not navigable, are private rivers, belonging to the proprietors on each side; therefore rivers in which the tide does not ebb and flow are private rivers, and belong accordingly. One thing is very clear by this law, that no man has an exclusive fishery in the waters of a navigable river. Every man may fish in a navigable river of common right. So is the law of nations,* and so is the language of reason. *Ward v. Cresswell* (a), *Warren v. Matthews* (b), *Carter v. Murcot* (c). In all cases the substantial question is, navigable or not. The mode of ascertaining the fact may be uniform in *England*, that is, certain appearances may always be taken there as evidence of the fact; but still it is the fact, and not the mode of proof, upon which the rights of parties depend. In *England* a stream is not navigable in law, unless the tide flows and reflows in it; or in other words, so gene-

(a) *Willes* 268.(b) 6 *Mod.* 73.(c) 4 *Burr.* 2164.

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rally may unfitness for navigation be predicated of all streams in *England* in which there is no tide, that it has at length become a maxim; but it would be absurd, in the highest degree in this country, to take the want of a tide as proof of, or rather the same thing, as unfitness for navigation, when our senses tell us it is not. The only reasonable course is to reject the *English* definition, and to act up to the sense and spirit of the principle which lies in this, that when a stream is altogether unfit for public navigation, it is the subject of private property, but otherwise it is not. That the common law definition and principle cannot both be applied to such a river as the *Susquehanna*, is unanswerably proved by the situation of the islands. A claim to them by the owners of the shore has never been heard of; and yet most clearly, by the common law, the islands in a stream which is not navigable, belong to the proprietors of the banks.

2. The concessions of *William Penn* were personal to the first purchasers. So it was held as to the *ninth* article by Judge *Washington* in the *Springetsbury* ejectments; and so it appears throughout. But granting it to be otherwise, the *sixth* article does not aid the plaintiffs, because the *Susquehanna* does not fall into his lot. It is no more in his lot than the land on the other side of the river. It was retained as proprietary estate, and the commonwealth succeeded to it.

3. Of usage there is no proof. There has not been time for an usage, nor would it be good. A man cannot prescribe for a right as annexed to certain tenements, which is common by law to all the citizens of the commonwealth. It was negatived by the legislature in 1771, before the plaintiff's pool was cleared. It is arguing illogically to say that such an act of legislation is not inconsistent with the fishery, because it merely regulates the passage. The law in fact regulates both fishing and passage; but if the latter alone, it is a denial of the exclusive fishery, because the right depends upon the ownership of the soil and water, which would have precluded the interference of government altogether. All that has been done by subsequent laws may be explained without admitting any thing in favour of the right. The ownership of the shores does certainly give a facility in the

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exercise of the common right, which is of much importance. It is sufficient to prevent all the mischiefs which are apprehended from the common right, and was an object that increased the value of those islands which the commonwealth offered for sale. The law for the sale of the islands therefore did well to notice the fisheries, but it says nothing of an exclusive right. So in the last law, pools and fishing places are spoken of as matters of fact, and fishing in them restrained and protected; the object of the legislature was to improve the navigation, to preserve the fish, and to protect the common right; but as to a custom of exclusive fishery, it is no where sanctioned. The forfeitures and penalties negative it. They are not given, as in case of an exclusive right they would have been, to the party injured, but to a common informer.

Whatever may be the plaintiff's right, he cannot recover in this action. He had not that kind of property or of possession which will support trespass. If he ever had possession, he gave it up, and the defendants have held it eleven years.

To the last observation the plaintiff's counsel *replied*, that it was immaterial in this stage whether trespass would lie, because the appeal was founded on the misdirection of the judge to the jury. But it was obvious, if the argument for the plaintiff was sound, that he had both the property and possession; that is, all the possession of which the property was susceptible.

YEATES J. after stating the facts delivered his opinion as follows:

It has been contended on the part of the plaintiff, that the owners of lands on the banks of the *Susquehanna* have the exclusive right of fishery in the river opposite to their shore. 1st. On the principles of the common law of *England*, applicable to our local situation; 2dly, on the original concessions of the first proprietary; and 3dly, by the particular laws and usages of *Pennsylvania*.

Cases have been cited from the *English* books to shew a distinction at common law, between fresh water rivers and

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navigable streams, *Hargr. Law Tracts* 1.; that where the tides ebb and flow, rivers are denominated *royal* or *navigable*, *Davis* 152. (56.): and that in rivers not navigable, the proprietors of the land have the right of fishery on their respective sides, generally extending *ad fihum medium aquæ*. 4 *Burr.* 2164. 1 *Mod.* 105. 1 *Swift's Conn. Syst.* 340 to 342. It has also been urged, that the policy of the law assigns an owner to every species of property within the state; as in lands newly created by the alluvion or dereliction of the waters; so that if an island should arise in the middle of a river, it belongs in common to those who have lands on each side thereof, or to the proprietor of the nearest shore. 2 *Bl. Comm.* 261.

The preamble of the old act of assembly, "for the advancement of justice, and more certain administration thereof," passed 31st *May* 1718, recites that "it is a settled point, that as the common law is the birth right of *English* subjects, so it ought to be their rule in *British* dominions." 1 *Dall. St. Laws* 133. And the law of the 28th *January* 1777, provides that the common law of *England* shall be in force and binding on the inhabitants of this state. 1 *Dall. St. Laws* 723. But the uniform idea has ever been, that only such parts of the common law as were applicable to our local situation have been received in this government. The principle is self-evident. The adoption of a different rule would, in the language of Sir *Dudley Ryder*, resemble the unskilful physician, who prescribes the same remedy to every species of disease.

The qualities of *fresh* or *salt* water cannot amongst us, determine whether a river shall be deemed navigable or not. Neither can the flux or reflux of the tides ascertain its character. Pursuing such rule would, in the first case, render the river *Delaware* an innavigable stream throughout the confines of the state; and in the second, would confine its navigable quality to its several courses south from *Trenton*. To assert that in either instance the proprietors of lands on the margin of that river, have the sole right of fishery to the middle of its bed, corresponding to their title in front of it, is, I presume, a doctrine which the warmest advocates for the right of exclusive fisheries, would scarcely contend for.

The property of the land covered by the waters of the *Susquehanna* remains in the commonwealth as other ungranted lands. Neither the late proprietaries, nor the state have granted it; and should a new island rise in the river, it would, under the authority of the cases cited, belong to the government. On this branch of the argument, it is sufficient to state that by an act of assembly passed the 9th *March* 1771, assented to by the then lords of the soil, the river *Susquehanna* and certain streams running into it were declared highways; and provisions were made to improve the navigation thereof. 1 *Dall. St. Laws* 556. The cases cited on the argument abundantly shew, that every man may of common right fish with lawful nets in a navigable river; that the proprietors of the land on each side have not the exclusive right of fishery therein, but that the fishery is common and public. 6 *Mod.* 63. 1 *Salk.* 357. *Willes*, 268. 4 *Burr.* 2164.

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The original conditions or concessions agreed upon by the first proprietary and the adventurers and purchasers in the province, dated the 11th *July* 1681, have been insisted on by the plaintiff's counsel as a ground of right. The 6th section thereof is in these words:—"Notwithstanding there be no mention made in the several deeds made to the purchasers, yet the said *William Penn* doth accord and declare, that all rivers, rivulets, woods and underwoods, waters, water-courses, quarries, mines and minerals (except mines royal) shall be freely and fully enjoyed, and wholly by the purchasers into whose lots they fall." 1 *Dall. Append. St. Laws* 7. I do not conceive, that these words would be sufficiently extensive to convey a right to the bed of a navigable river, even to the first purchasers, unless it appeared clearly that it fell within their lot: but be this as it may, I fully concur in opinion with the Chief Justice, that these concessions were personal and confined to the first purchasers, and those claiming under them. Amongst the parts of this instrument, consisting of twenty sections, the 3d, 4th, 7th, 8th, 10th, 11th, 12th, 14th, 17th, 18th and 20th sections, will, on examination of the nature of the subjects to which they respectively relate, be found to be applicable to the original adventurers and purchasers. And in the case of the

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Springetsbury manor in *York* county, in the Circuit Court of the *United States*, it was decided on argument that the 9th section which runs thus,—“In every 100,000 acres the governor and proprietary by lot reserveth ten to himself, which shall lie but in one place,” was confined to the cases of the first purchasers.

Upon the trial, the act “for regulating the fisheries in the river *Susquehanna* and its branches,” passed 16th *March* 1807, was mentioned, but it had not been then published. Another act of 6th *March* 1793, which bears strongly on the subject in question, was not adverted to. The custom respecting the fisheries in *Susquehanna*, was insisted on as a matter notorious to all who lived near the river, but no evidence was given of it. On neither of these laws, nor on the custom, was the opinion of the Chief Justice required, nor was it given. I think all of them material in the case.

As to the custom, I need no proof of it. I have cautiously avoided looking into the affidavits overruled on the argument. For forty-five years last past at least, I have understood the settled usage to have been, that the owners of lands on the margin of the *Susquehanna*, or the islands therein, upon their clearing out a pool of *reasonable extent* immediately opposite to their respective shores, had and exercised the sole right of drawing their seines therein. Even the defendants in this case gave in evidence, a small additional clearing in 1796 in the pool near the sand-bar, from which, I presume they derived some species of right.

Until lately, I heard of no one pretending to disturb them. The first attempt of that kind, which I now recollect, was the ingenious device practised near *Harrisburg*, of anchoring a raft, at a small distance from the shore, and converting it into a landing place. But the contrivance was rendered abortive by the verdict of a jury. Hitherto I have thought, that the exclusive privilege of fishery, confined and limited as I have stated it, conduced to the public good. It did not injure the navigation of the river. But the wild claim of privilege to the middle of the river, I never till this period heard seriously asserted. There can be no shad fisheries unless the rocks and stones are removed from the bed of the river, which forms the pools. This is frequently effected at

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a considerable expense, and requires renewed attentions. No one will bestow his money and labour on a pool, which afterwards is to become the common right of every citizen. Forcible opposition would of course be made to the invaders of the supposed right; and the shores of the *Susquehanna* would thus be rendered the theatres of violence and tumult. I well recollect, that on the trial of *Diffendorffer et al. v. Jones*, before all the judges of this court at nisi prius in this place, we urged on the part of the plaintiffs the established common law doctrine, that the landlord after the end of a term for years, for which lands were leased, was entitled to the exclusive possession, and that it was the folly of the tenant to put in a crop, which he could not remove during the continuance of the lease. But we were told by *M^r Kean* Chief Justice, that the tenant was justified by the custom of the country, in what he had done, and that the strict common law rule did not apply to the case. This was previous to the publication of the report of *Wigglesworth v. Dallison et al.* amongst us, wherein it was held, that a custom, that tenants should have the way going crop after the expiration of their term, was good. I was then dissatisfied with the decision of this court, considering it as an innovation on settled law. It made a strong impression on my mind, which was increased by the circumstance of Judge *Bryan* copying the *English* case from the book, *Doug.* 190. 201., which arrived some time after, and furnishing me with it at the ensuing court. It is laid down by the court, that the law has a great regard to the usage and practice of the people; the law itself being nothing else but *common usage*, with which it complies, and alters with the exigency of affairs. 2 *Mod.* 238.

At present, the custom I have mentioned, appears to me to be a good one; but I hold myself at liberty to retract this opinion, should further consideration induce me to alter my mind.

The legislature have passed several laws for the preservation of the fish in the *Susquehanna* and its branches. It was discovered, that several persons were desirous of obtaining landings in the river, though even on sand bars, in order to enable them to draw out their nets. It was obvious, that such

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landings would affect the interests of the owners of lands on the opposite shores, if they possessed any peculiar privileges from the situation of their lands. The act of 6th *March* 1793, 3 *Dal. St. Laws* 310., prevented that injury. It directed, that no warrants should issue for islands in the *Susquehanna*, unless the same were susceptible of cultivation; and that all sand bars and islands not susceptible of cultivation, for which titles had not been obtained prior to the 4th of *July* 1776, should be and remain common highways for ever. In ascertaining the value of the islands applied for, regard was to be had to the soil, wood, and distance from the main land, and to the advantages that might be derived from the same, in regard to *fisheries*. I cannot think that these provisions in the law, were founded on the policy of preventing obstructions in the navigation of the river, as has been suggested. The preamble recited, that "it was convenient to dispose of the islands in the *Susquehanna* and its branches;" and the sale of even sand bars would bring money into the public treasury; but the public sense seemed to be, that this ought not to be effected, to the manifest loss of the individuals on the opposite shores.

The late act, passed on 16th *March* 1807, 8 *St. Laws* 74., shews a legislative exposition of individual rights to fisheries in the *Susquehanna* and its branches. It professed to regulate the fisheries therein, and went into operation immediately after the passing of the act. The third section describes what shall be deemed a pool or fishing place, within the meaning of the law. The fourth section provides, "that whenever there is, or may be, a pool or fishing place on both sides of the river, and opposite each other, in whole or in part, or where there is, or may be, a pool or fishing place on an island, shoal, or sand bank, opposite, in whole or in part, to the pool or fishing place on either side of the river or island, where they sweep the whole channel, no seine or net shall be drawn in such pools or fishing places, to both landings, in any one period of twenty four hours," and proceeds to direct, that such fisheries shall be alternately occupied, under the penalty of three hundred dollars. These regulations appear to me to be utterly inconsistent and incompatible with the common right of fishing in such pools.

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It has been contended by the defendants' counsel, that this action being founded in possession, could not be maintained, unless such possession was shewn in the plaintiff. The possession of a pool of water, and the exercise of the right of fishery in it, is of a very special nature. It is confined to the season when the nets are thrown into the water, and the element is in a constant state of change: and such a possession as the nature of the subject was capable of, should be shewn from time to time. But if the custom I have spoken of be legal, the peaceable possession of the land adjoining the river, would be *prima facie* evidence of possession of the pool. The jury were to judge whether this possession was abandoned and relinquished. I do not find that the Chief Justice charged the jury, or gave his opinion on this point to them.

The light in which this case strikes me, on the best consideration I have been able to give it, is, that it demands reconsideration; and that the peace of the country is intimately connected with our present decision. On another trial, evidence of the usage may be given, without depending on it as a known fact. Its validity may then be determined on, and the laws I have adverted to, will be fully considered and judged of. If the plaintiff cannot establish his exclusive right to this fishery, or shew his possession therein, to the satisfaction of a jury, on a future trial, he cannot prevail: but if his pretensions can be fully established, I see no reason why he should be precluded therefrom; nor can I discover that any injustice will be done thereby to the defendants.

Upon the whole matter, I am of opinion, that a new trial should be awarded, and that the costs of the former trial should abide the event of the suit.

BRACKENRIDGE, J. Whatever may have been the mode of acquiring real estate in *England*, or whatever the nature of the tenure, the designation of separate property in land, would seem to have been by natural boundary, or by the artificial distinction of land marks. The transmission or alienation was made usually by a *descriptio loci*, or by a designation of quantity. If the land was covered with water, a grant of it under that description was necessary to pass the fee simple in the soil; though in order to have an exclusive fishery

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in a river, all that was necessary, was that the party seized of the river, should by his deed grant *separalem piscariam* in it, and make livery *secundum formam chartæ*, in which case neither the soil nor the water passed, but merely the fishery; or should grant *aquam suam*, which was attended by the same consequences. *Co. Litt. 4. b.*

The law presumes an incorporeal hereditament like the one in question, to have been originally founded on a grant by him who had the fee simple of the land *aquâ cooperta*; and where a grant by deed cannot be shewn, a prescriptive enjoyment may be alleged as the evidence of a grant. A man may prescribe to have *separalem piscariam* in such a water, and the owner of the soil shall not fish there. *Co. Litt. 122. a.*

This is the common law of *England*, which is our law here, so far as regards the nature of the tenure of real estate. The right of piscary must be a right appurtenant to the soil covered with water. It must be a part of the fee simple of that soil, and must be supposed to have been originally granted out of it, by him who had the fee simple. What evidence is there of a grant here? There will not be found any such grant *eo nomine* in the land office, nor in the possession of any person.

But it is alleged that the grant of soil adjoining water, carries with it a grant of such hereditament in the soil covered with water; that is, the grant of one soil, carries with it an hereditament in another; for the right in the water cannot be an appurtenance of the soil adjoining, as it never could have made a part of the fee simple of it. What evidence is there, that the grant of the soil adjoining, carried with it the grant of an hereditament in the soil covered with water? It is not found in any application to the land office, in any warrant of survey, or in the recital or grant of any patent.

Prescriptive enjoyment is alleged as evidence of the grant; an enjoyment whereof the memory of man runneth not to the contrary. Has there been time since the opening of the proprietary land office, or even since the granting the charter to *William Penn*, for such a prescription to run? Admit that there has, so far as regards what may be the subject of a writ of right, in which by the statute of 32 *Hen. 8.* sixty years is the limitation. Yet this prescription is still founded on the

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presumption of an original grant. How is this presumption repelled? By the acts of ownership which the proprietary, originally, and the commonwealth since, has continued to exercise on the subject of this alleged grant; or if acts of ownership did not exist, the presumption would be repelled by the history of the settlement of the state. Could it be inferred from the taking *vesturam terræ*, of unappropriated land, that such hereditament had been granted out of it? If this were the case, that the enjoyment for sixty years of the vesture of unappropriated land, would give a right to that vesture *in perpetuum*, the fee simple of most of the lands in the state would have been diminished before they were granted. The same reasoning will hold with regard to a claim of piscary in water.

But the acts of ownership continued to be exercised by the proprietary government, and by the commonwealth since it succeeded to the fee simple of the soil, repel all presumptions of an original grant. The charter to *William Penn* is bounded on the east by the *Delaware* river, and it gives him the free and undisturbed use of rivers within the limits and bounds mentioned, together with the fishing of all sorts of fish. In the conditions or concessions agreed upon in *England*, by *William Penn* and those who were adventurers and purchasers, it is provided that all rivers and waters shall be freely and fully enjoyed by the purchasers *into whose lot they shall fall*; so that it may be inferred, that waters must fall into a lot, before they can be enjoyed. Grants from the proprietary land office have been carried into effect in a manner that excludes all land not contained within the survey returned. For these grants have been originally made, and are still in some measure to be ascertained, not by natural boundary or land mark, or description of place or quantity, as originally in *England*, but by the course of the compass, and measured distance. Where the survey is bounded by the water, and calls for it, as in this case, the land to the water is supposed to pass, even though an interstice may remain *ad flum aquæ*; but no conclusion can be made of a further grant. By the instructions to surveyors, the proprietary would seem to have had in view the accommodating settlers with the use of water, by restricting a front to a certain proper-

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tion to the extent back, as a general rule. But I cannot infer from all that I know of these grants, any presumption of an exclusive use of the water, or hereditament of the soil covered with water, but rather the contrary.

The provincial legislature, of which the proprietary by his governor made a part, appear to have exercised from the earliest period, an ownership over all rivers and waters within the province, making them highways, or considering them as such. By an act of 1700, they prohibited the erection of wears, "to the end that all persons inhabiting near any creek or river in the province, might enjoy all privileges and advantages that from them were to be reaped." 1 *St. Laws* 21. In 1724 they prohibited the erection of bridges over any river or creek within the province, navigable for any sloop, shallop, flat, or other craft, which might anywise stop or hinder the navigation; reciting in the preamble of the law, that the erection of bridges over rivers, to the obstruction of their navigation, not only affected the interest of the owners of lands upon and near navigable waters above those bridges, but also the trade of the province in general. 1 *St. Laws* 227. In 1761 they again interdicted the erection of wears in the *Delaware*, *Susquehanna*, and *Lehigh*, and made various regulations to preserve the fish in those rivers. 1 *St. Laws* 396. In 1768 they passed an act for regulating the fishery in the river *Brandywine*, with this striking preamble: "Whereas it hath been represented to this assembly, by petition from a number of the freeholders in the county of *Chester*, that live on or near the river called *Brandywine*, that their ancestors, themselves, and the poor adjacent inhabitants, have formerly enjoyed great advantages from the fishery in the same river; and although no person owning land below the fork or main branches, can claim any right, by survey, to the lands covered with the waters thereof, yet divers persons have erected dams across the said river, to the almost total obstruction of the fish running up the same, be it enacted, &c." 1 *St. Laws* 497. In 1771 there is the same preamble, and the same remedy for preserving the fish in the rivers *Codorus* and *Conewaga*. 1 *St. Laws* 547. In 1774 by a law with the same preamble, and with similar regulations, they prohibit all persons from drawing their seines

within twenty perches of milldams built in a certain manner on the *Connestogoe*. 1 *St. Laws* 693. In the act of the 20th of *September* 1783, for settling the jurisdiction of the river *Delaware*, between the states of *Pennsylvania* and *New Jersey*, there is a provision that each of the legislatures of those states shall hold and exercise the right of regulating the fisheries on that river. 2 *St. Laws* 143. By an act of *March* 1803 privilege is given to any persons owning lands adjoining any navigable stream declared a highway, certain rivers excepted, to erect dams for mills, under the restriction of not injuring others or *the public*. 5 *St. Laws* 389. The act of the 8th of *February* 1804, regulating the fisheries in the *Delaware* and its branches, speaks of a pool, and provides that where any fishery is occupied upon the *Delaware*, either the landholder or tenant in possession shall regulate such fishery, and shall be answerable for all fines and penalties that may occur on account of any transgression of the act that may or shall be committed at his or their respective fisheries, and shall give a description in writing of their pool or fishing place; and if any person shall undertake to fish without having entered security to pay the fines and penalties that may occur, or without permission of the person who has entered security, he shall pay one hundred dollars for every offence. 6 *St. Laws* 77. An act of *March* the 9th 1771, regulating the fisheries in the *Schuylkill*, prohibits a practice of fishing with divers seines in the same pool, diminishing the fish too much, and depriving inhabitants above of a reasonable proportion; and it directs, that where two or more persons residing opposite to each other near the said river, on different sides thereof, *may have suitable landing places on the respective shores*, or on an island opposite thereto, for taking seines and nets out of a pool or fishing place, it may be lawful to fish alternately, and not otherwise. 1 *St. Laws* 546. By the act of 13th *March* 1807, we have the latest and most complete regulations with regard to fisheries, particularly of the *Susquehanna*; from all which I deduce an exercise of ownership, both under the proprietary, and under the commonwealth, over all waters not included in surveys, or which have been made highways; and where the acts speak of pools or fishing places of persons, the owners of the ad-

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joining grounds are meant, who by having the shore, have the right of drawing the seine upon it, but not as having an exclusive right to the pool; so that though other persons could not draw there, the land being owned *ad filum aquæ*, yet an island or sand bar lying off, there could be nothing to hinder the drawing a seine in the same pool, under the regulations prescribed by the act. For by act of the 6th of *March* 1793, all sand bars and islands in the *Susquehanna*, not susceptible of cultivation, and not surveyed and returned into the surveyor general's office for the use of the late proprietaries, are made highways. From hence therefore it would seem to follow, that an individual might fish, as well as the owner of the adjacent soil on either side, under the regulations prescribed; these regulations seeming to respect the reasonable use of a common property, and not the protection of an exclusive enjoyment.

These principles do not apply to surveys which include streams, where the soil covered with water makes a part of the grant. But even in the case of surveys bounded on water, where a small stream intervenes, I can see nothing that can give either of them the exclusive use of that stream. Wading up a brook between surveys on each side, and which call for the brook as a boundary, or pushing a canoe, or throwing out a hook and line, and angling for fish, would not seem a trespass. Could I be disturbed if I occupied a rock in the stream? Might I not claim by my possession against all but the proprietary originally, or the commonwealth now? What is there to hinder me from calling a lizard's length of land my own? *Est aliquid dominum sese fecisse lacertæ*. Admitting however that a streamlet or brook shall not be considered as dividing surveys, so as to make a space separate between them that could be appropriated, shall it be so considered to the mouth of the river which this streamlet shall become? The charter proprietary, the Commonwealth which has succeeded, has not so considered it. This repels the allegation of an undisturbed or acknowledged exclusive occupancy, which must be the foundation of any prescription that can be alleged in this case.

I am therefore of opinion in the words of the Chief Justice at the trial, that the owner of lands on the banks of the

Susquehanna, has no exclusive right to fish in the river immediately in front of his lands; but that the right to fisheries in the said river is vested in the state, and open to all.

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New trial refused; and
Judgment for defendants.

Lessee of FEHL against GOOD and another.

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THIS ejectment was tried before Mr. Justice Yeates at a Circuit Court for Lancaster County in May 1806, when a verdict was found for the plaintiff. In May 1808, the late Judge Smith, who rode that circuit, ordered a new trial upon the inspection of Judge Yeates's notes; and from this decision the plaintiff appealed.

Though a verdict be against the opinion of the judge who tried the cause, yet if it turned upon the credit of witnesses, a new trial will not be granted, except in extraordinary cases.

The case turned upon the accuracy of a line and boundary claimed by the plaintiff for his survey. One witness, whose general credit was not impeached, swore in support of the plaintiff's claim. Six witnesses swore the other way. The judge was of opinion that the cause depended very much upon the credit of the plaintiff's witness, and that the weight of evidence was with the defendants; but the jury who had had a view, concurred with the single witness, against the charge of his Honour.

Montgomery and C. Smith for the plaintiff contended that where the evidence was contradictory, and depended upon the credit of witnesses, a new trial ought not to be granted, although the verdict was against the opinion of the judge; particularly where the case turned upon such a fact as was in controversy here, and the jury had viewed the premises. They cited *Ashley v. Ashley* (a), *Smith v. Huggins* (b), *Swain v. Hall* (c), *Hankey v. Trotman* (d), *Francis v. Baker* (e), and an anonymous case from 11 Mod. 1. In *Francis v.*

(a) 2 Stra. 1142.

(c) 3 Wils. 47.

(e) 6 Bac. Ab. 664.

(b) 2 Stra. 1142.

(d) 1 W. Black. 1.

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Baker, Pratt Ch. J. says, that where there is a contrariety of evidence as to the principal matter in issue, and the character of witnesses on both sides stands unimpeached, the weight of evidence does not depend altogether upon the number of witnesses; for it is the province of the jury who may know them all, to determine which witness they will give credit to, and no judge has a right to blame a jury for exercising their power of determining in such a case.

Bowie and *Hopkins* contra, answered, that new trials were so completely subject to the discretion of the Court, and so little dependent upon precise rules, that every case must be governed by its own circumstances. That there was however one fundamental rule upon this subject, a rule founded in reason and in justice, that where the verdict was strongly against the weight of evidence, a new trial ought to take place; 6 *Bac. Abr.* 663, 4.; and that in the present case, there was not only the preponderance of six witnesses over one, but the opinion of the judge who tried the cause, and of the judge who granted the new trial, that the weight of evidence was clearly against the verdict. They also contended that the merits were with the defendants.

TILGHMAN C. J. delivered the Court's opinion.

In this cause a verdict was found for the plaintiff, and the question is, whether a new trial shall be granted.

The charge of the judge inclined in favour of the defendants, but the cause turned upon matters of fact, and it was submitted to the jury as resting very much upon the credibility of one of the plaintiff's witnesses. The character of witnesses, and the credit which is due to them, are subjects peculiarly within the province of the jury; and where the verdict has depended on these points, the Court has always refused to interfere, except in extraordinary cases. For this reason, without expressing any opinion upon the merits of the cause, we think it proper that the verdict should stand. The judgment of the Circuit Court is therefore to be reversed, and judgment entered for the plaintiff.

New trial refused, and
Judgment for plaintiff.

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Lessee of HENRY against MORGAN and Cox.

THIS was an appeal from the decision of Judge Teates at a Circuit Court for *Dauphin* in November 1805.

It was an ejectment for a tract of land, which the plaintiff claimed under a deed with special warranty from one *Christopher Lowman*, who derived title from the executors of *John Meem*, by a deed dated the 14th January 1776, which was never recorded.

The defendants claimed under a sale made afterwards by the sheriff, by virtue of an execution against a certain *John Kline*; but their title was in no manner derived from *Meem* or his executors. They were in possession of the land under the will of *Elizabeth Ferguson*, who made them her executors, and authorized them to sell it.

To obviate any objection to the validity of the deed to *Lowman*, from the omitting to record it, the plaintiff offered in evidence the deposition of *Lowman*, to prove that *Cox*, one of the defendants, offered to purchase of him the land in dispute, prior to the time when he first had a concern in it; and that he must therefore have known of the deed to *Lowman*.

To this deposition the defendants made two objections. 1. Because it appeared by the deposition that the witness was interested; for upon being asked on his examination, whether he had agreed to warrant the title to the plaintiff, his answer was "that he had made no such agreement, but that being asked by Judge *Henry*, before whom the deed was acknowledged, whether he would be forthcoming for the title, he replied, that it would be right that the deed would be good." 2. Because that part of the deposition was not legal evidence, in which *Lowman* said that *Cox* offered to purchase the land of him, inasmuch as *Cox* had then no interest of any kind in the land, nor afterwards, except as executor and trustee under the will of *Mrs. Ferguson*; and of course notice of *Lowman's* title, though brought home to *Cox*, could not affect the parties in interest under the will. But his Honour overruled the objections, and admitted the deposition.

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It lies on the party who objects to the competency of a witness on the ground of interest, to shew an interest or supposed interest at the time of the oath being administered.

It is not enough that the witness at a former period conceived himself to be interested.

In an ejectment against a trustee, it is not competent to give evidence that he had notice of an unrecorded deed before his appointment, because it cannot affect the *cestui que trust*.

The recording act of 1775 does not make void an unrecorded deed, as against a subsequent purchaser under a title totally unconnected with that deed, but only as against purchasers under the same grantor.

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A material question upon the merits was the validity of *Lowman's* deed; and upon this point Judge *Yeates* charged the jury, that the supplement to the recording act, which provides that every deed thereafter, which shall not be recorded within six months after execution, shall be adjudged void against any subsequent purchaser for a valuable consideration, was designed to embrace the case of a person executing a deed to one man, and afterwards executing another deed of the same premises to another man, without notice of the first, in which case the second deed, on being recorded first, would be valid against the first deed, if not recorded in six months. But that it was not the object or meaning of the act to embrace the case of a deed not recorded, where a third person afterwards purchased the same land at sheriff's sale for a valuable consideration and without notice, as the property of a person in no wise connected in title with the grantor in the unrecorded deed; and therefore that the unrecorded deed to *Lowman* was good against the defendants.

The jury found for the plaintiff; and a new trial being moved for upon the ground of misdirection, and the admission of *Lowman's* deposition, the judge refused it, and the defendants appealed.

Hopkins for the defendants, and in behalf of a new trial.

1. *Lowman* either was interested in fact, having undertaken at the execution of the deed, to make good the title, or what is sufficient for us, he thought himself interested. If a witness expects to receive any thing even from the generosity of the party for whom he is called, he is incompetent. *M'Veaugh v. Goods* (a). So if he apprehends himself to be interested, though *stricto jure* he is not, or owns himself to be under an honorary though not under a binding engagement. *Fotheringham v. Greenwood* (b). He is under a bias, and that is enough to exclude him.

2. The conversation with *Cox* was wholly irrelevant. Its object was no doubt to affect the real parties in interest with notice of *Lowman's* deed, so as to cure the want of registry. But this was not a legal object, because at the time of the conversation and long after, *Cox* had no connexion with the

(a) 1 *Dall.* 62.

(b) 1 *Stra.* 139.

land, and was nothing but a trustee at the trial. It is impossible that notice to a stranger who afterwards becomes a trustee, can raise an equity against the *cestuy que trust*. *Cox* was not the purchaser, but the executor of the purchaser without notice.

3. The recording act of 1715 merely directs that deeds *may* be recorded. The supplement in 1775, 1 *St. Laws* 703, orders that they *shall* be recorded within six months, or otherwise shall be adjudged void against *any* subsequent purchaser for a valuable consideration. A purchaser at sheriff's sale is within the act. His case is still stronger than that of an ordinary purchaser, because he has not the same means of inquiring into the title, and is compelled to rely much upon the debtor's possession and avowed ownership. He is therefore entitled to a strict construction of the act in his favour. The deed is void by the act. The neglect to record it, was the cause of the purchase from the sheriff, and of several subsequent purchases, because if upon record, it would have been known at least as an interfering title. How can the plaintiff then claim a liberal construction of the law to take him out of its letter, when he has no equity as against the purchaser. That such a deed has no effect, seems to have been the opinion in *Shrider's Lessee v. Nargan (a)*. The utmost extent to which the court has gone in relieving from the letter, is where actual notice has been brought home to the purchaser.

Fisher for the plaintiff. 1. *Lowman* had no interest, because he conveyed merely with special warranty; and the answer to the judge was not a new contract, nor an interpretation of the deed. He did not even think it so, for on his examination he denies an agreement. But whatever he thought at the time of executing the deed, there was not the slightest evidence that he felt an interest at the time of his examination. He did not say that he then thought he was bound to warrant, or that he was interested. To exclude a witness on account of his merely apprehending an interest, the bias must exist at the time of giving his evidence, and it lies on the party who objects, to prove it.

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2. If *Cox* was interested at the time of the trial, his knowledge of the unrecorded deed would affect him. How far it would avail, depended upon his interest, and other circumstances which might appear on the trial. Though he was executor, he might not have been in possession as executor. It was competent, if it could have the least possible effect, either as to the deed, or as to any equity which a want of notice would authorize the defendants to set up.

3. The recording act of 1775 relates only to purchasers under the same person who made the unrecorded deed. What was the mischief? That a purchaser, pursuing the examination of a title, would find it perfect up to the vendor, who for any thing that appeared was undisputed proprietor; while in fact there was an outstanding deed from him, which would sweep off the property. The remedy prescribed was the recording of all future deeds within six months. But how would this benefit a purchaser who was pursuing a distinct title? The record of a deed unconnected with his chain, would never give him notice, because he would never be led to it; nor was he within the mischief of the old law, because that did not consist in the concealment of an opposing title, but in the concealment of a part of the very title under which he was purchasing. The law must therefore be construed with reference to this object. As to sheriff's sales, they stand upon no better footing than sales by the debtor. By the act of 1705 all the defendant's estate is sold, and nothing more. The purchaser takes his place.

TILGHMAN C. J. after stating the case, delivered his opinion as follows:

1. The deed from *Christopher Lowman* to the plaintiff, contains only a special warranty against himself and all persons claiming under him. He was asked on his examination, whether he had agreed to warrant the title of the land in dispute; and his answer was, that he had made no such agreement, but that on being asked by Judge *Henry*, before whom the deed was acknowledged, whether he was to make good the title, he answered that "*it would be right that the deed would be good.*" From hence it is inferred, that he was bound to warrant the title, and therefore interested in the event of this suit. It does not strike me in this light. I do

not consider the answer to Judge *Henry* as any part of the contract. It does not appear that this question was proposed at the instance, or in the presence of the grantee; and at most it only shews the opinion of the grantor, that the deed which he was about to execute, would bind him to a *general warranty*, in which he was mistaken. But it is objected, that if he *conceived* himself interested, he was not a competent witness, although in fact he might not be interested. Without entering into that question, the objection has no weight with me, because it does not appear that the witness at the time of his examination, did conceive that he was interested. He was not asked, whether he thought himself interested at that time. He speaks only of what passed, at the time of the execution of his deed; and it lies on the party, who objects to the competency of a witness, on the ground of *interest*, to shew an interest, or a supposed interest, existing at the time of the oath being administered.

2. I will next consider the objection to the conversation between *Lowman* and *Cox*, one of the defendants. The plaintiff introduced this conversation to shew that the defendants had notice of the unrecorded deed from *Meen's* executors to *Lowman*, otherwise he would not have offered to purchase. It has been decided that a purchaser with notice of a deed, not recorded, shall be affected by it, and therefore proof of such notice was supposed to be material. The question then will be, whether *Cox's* knowledge of an unrecorded deed, at a time when he had no concern in this land, can have any legal effect on a subsequent purchaser for valuable consideration without notice, who happens to appoint *Cox* one of his executors with power to sell. I do not think that it can. The words of the recording act, are, that the deed shall be void against subsequent purchasers for valuable consideration. Now although the law declares the deed to be void, yet the court have said, that it is to be so construed, as not to encourage *fraud*. It is against equity, that a man who knows of a purchase for valuable consideration, made by his neighbour, should deprive him of the benefit of that purchase, because the deed was not recorded. The only purpose of recording is to give notice; and if notice is had by any other means, it is sufficient. But in the case before us, the

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plaintiff has no principle of equity to urge against the real owners of this land. The defendant *Cox* is but a trustee, an instrument for their benefit. It would be flagrantly unjust then that the representatives of *Elizabeth Ferguson* should be affected by notice to him. I am therefore of opinion, that evidence of such notice was irrelevant, and ought not to have been admitted. But it does not follow from thence, that there should be a new trial. That will depend on the third point; because if the not recording of this deed, is not an objection of which the defendants can avail themselves, then the plaintiff would have been entitled to the verdict, although the evidence of *Cox's* offer to purchase had not been admitted.

3. Although the words of the act of *May 1775*, are general, that deeds not recorded according to the provisions of the act shall be void against subsequent purchasers without notice, yet these general expressions must be construed so as to accomplish the intent of the act, which was to protect innocent purchasers from suffering by the fraud or negligence of those, who had obtained prior conveyances from the *same person*, and omitted to have them recorded. If unrecorded deeds of this kind, were to prevail against subsequent purchasers, no human prudence would be sufficient to guard against imposition; because the title submitted to the examination of the last purchaser, independent of the unrecorded deed, would be perfect. But that is not the case, where a man purchases under a title totally unconnected with the first deed. He is entitled to no protection, because he has placed no faith in the title, to which the unrecorded deed relates. It would be unjust, that one, who has purchased under a bad title, should have his estate confirmed by the mere accident of a deed between two persons, with whom he had no privity or connexion, being unrecorded. It appears clearly to me, that cases of this kind are not within the meaning of the act, nor have I ever heard of its being construed so as to embrace them.

Upon the whole of this case, my opinion is, that the judgment of the Circuit Court be affirmed.

BRACKENRIDGE J. There is no doubt but that in legal language, and in contemplation of law, the purchaser at sheriff's

sale is a purchaser; but whether such a purchaser as is within the contemplation of the act of assembly of 1775 for the recording of deeds, is a question that I do not know has been determined, with this single point in view for the consideration of the court. Be that determination what it may when it occurs, it does not seem necessarily to occur at present; for this is not the case of a purchaser at sheriff's sale, of the estate of a debtor who claims under the plaintiff. It is of the estate of a debtor, between whom and the estate claimed, no privity existed. It was not the lease to the debtor that was sold, but a supposed right in the debtor not derived from the plaintiff.

The question in this case then will be, can the plaintiff who derives title, not prior nor subsequent, but from a source independent of that under which the defendant derives title, be affected by the purchase of a title to which the plaintiff is a stranger. Shall a purchaser from one who has no right, hold against a purchaser from one who has right, because this purchaser from the right owner had not given notice of his purchase? For recording is for the purpose of giving notice, and nothing more. It is necessary from the exception taken that we determine this point. It is the first time that I have heard the point made. It never occurred to me to make it in my own mind; and as the counsel by their argument seem to admit, it would be carrying the curtesy of the law, in favour of a sale by the officers of the law, beyond the protection given to a sale by an owner himself; so that this medium of transfer should operate with the effect of a sale in market overt, and pass the property. The idea is bold, and does credit to the ingenuity of the counsel, but it is untenable. The effect of a sale by the law, cannot go farther than a sale by the individual whose trustee it becomes. The point yet remains to be determined whether it can go as far. I am of opinion that the effect of the recording act in this case has no application. It is not a sale that comes within the meaning of the act; for that, I take it, respects purchasers under the same bargainor or grantor, and no other. I understand the words "*subsequent purchaser*," to relate to purchasers from or under the grantor or bargainor before spoken of, and with regard to whose acknowledgment or proof of handwriting provision had been made.

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This is not the first question made in the case, but I have considered it first, because it is the least difficult. On the remaining point, the inclination of my mind has been, that there was something in it, and that the testimony excepted to, ought not to have been admitted. I take it, that the words, or way of thinking, of a person not interested, ought not to be given in evidence against him, when he comes to have an interest, for any other purpose than to shew notice. A purchaser in his own right, could not be affected by what he had said of the title when he had not an interest, further than to the point of notice, and having notice could not affect him purchasing from one who had not notice; nor could the words of a trustee affect him for whom the trust is made, though he were made a party to the suit. The evidence in this case then, as to notice and actual knowledge of the deed by *Cox*, was irrelevant, and could not affect the defendant. But it ought not to have gone to the jury, for it might weigh something with them. Notice was out of the question. The not having notice, would give the defendants no equity. But the jury might be led to think otherwise; and the plaintiff himself seems to have thought, that the having had notice, destroyed some equity, which but for that, the defendants could have set up. They might have had an equity on the ground of the plaintiff's standing by, and suffering them to lay out money, without giving them notice of his claim; though it was not on this ground, that an equity was considered as arising. But the evidence was thought relevant, as shutting the mouth of the defendants, as to any plea of limitation, or time which had elapsed, during an adverse possession without notice.

It then becomes a question, not as to the relevancy of the testimony, but as to the competency of the witness; for had the testimony been irrelevant, even though inadmissible, and such as could not have affected the minds of the jury, it would not seem to be a legal ground for granting a new trial.

The witness examined had been the grantor of the estate. At and before the execution of the deed, he was asked whether he would be forthcoming for the title; and he answered, that "it would be right that the deed would be good." The words "grant, bargain and sell," have been con-

strued not to give a warranty against any thing but the acts of the grantor himself. But the words used, would seem to me to justify the enlarging the construction, according to what appeared to be the understanding of them by the grantor at the time of the execution. Taking his declaration into view, I should think he was forthcoming or answerable, to the extent of a general warranty. It is a fraud in him, after such a declaration of his understanding of the contract, to shelter himself under a construction of the words "grant, bargain and sell," which does not appear to have been in his mind at the time. I believe that the popular understanding has always been, that they gave a warranty, that what a man undertook to sell, was his own. This was the understanding and the law in the case of a personal chattel; and they make no distinction in the case of the sale of real estate.

But it did not appear what was the understanding of the witness on this head, at the time when he gave his testimony. It is to be inferred, that his understanding remained the same, as the contrary does not appear. It lay upon the party adducing the witness, to shew, that his understanding at the time of giving his testimony, did not remain the same, and that his mind had been relieved from that impression of an interest, which had been upon it.

Evidence having been illegally admitted, there must be a new trial; for although on the question of law involved in the issue, a judge would be bound to direct the jury in favour of the plaintiff, the evidence out of the way, yet the jury, the evidence being out of the way, might undertake to decide the law, and would have a right to decide it in a different manner; I mean as to the effect of a want of notice. They could be controlled only by granting a new trial. The admitting the evidence, and saying that, because it could not change the law in favour of the plaintiff, in the court's opinion, though it might in the opinion of the jury, a new trial should not be granted, is taking away from the jury their constitutional right to judge of law and fact, when the law is involved in the fact, or is a conclusion from it, in a general issue, which cannot be done. In this case the jury had a right to judge of the effect of notice; but they had not a right to the evidence, which may have misled them in judging, or at least

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had an effect upon their judgment. It ought to have been excluded from them.

It would seem to me therefore, that there ought to be a new trial, excluding the evidence; the jury nevertheless to be directed by the judge, that the verdict be the same, for that in the opinion of the court, the admission or exclusion of the testimony, did not affect the law of the case.

New trial refused, and
Judgment affirmed.

Lancaster,
Saturday,
June 2.

HAMAKER *against* EBERLEY.

An agreement by a surety to forbear a suit against his principal, *after he shall have paid the debt of the principal*, is a good consideration to support a promise, although at the time of the agreement, the surety had no cause of action against the principal.

The plaintiff declared, that he informed the defendant he was apprehensive that *he should have to pay certain bonds in which he was joined with his principal, and that he would sue the principal*; whereupon, in consideration that the plaintiff *would refrain from suing*, the defendant promised to save him harmless, &c. After verdict, this is to be intended an agreement to forbear suit, *after he had paid the money*.

A promise to forbear in general, is to be understood a total and absolute forbearance.

ASSUMPSIT. The declaration contained three counts; but the verdict being rendered for the plaintiff, upon the second and third only, the first is immaterial.

The *third* count was for money had and received. The *second* stated, that a certain discourse being had by and between the plaintiff and defendant, on the 1st of *February* 1799, of and concerning certain bonds, &c. the plaintiff then and there informed the defendant, that he was apprehensive he should lose a sum of money which he *should have to pay* for a certain *Valentine Hummel* to one *Mordecai Lincoln*, on account of four bonds, dated the 12th of *May* 1795, in which the plaintiff was bound to the said *Lincoln*, as security for the said *Hummel*, who was also bound as principal in the said bonds, and that he the plaintiff *would sue the said Hummel on account of the said bonds*; that thereupon the defendant requested the plaintiff not to sue the said *Hummel*, and then and there promised the plaintiff, in consideration that the plaintiff *would refrain* from so suing him, he the defendant

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would include the amount of the said bonds in a judgment to be entered for himself against the said *Hummel*, and would save the plaintiff harmless against the said bonds. The plaintiff then averred that he *did refrain* from suing the said *Hummel*, and that the defendant *did include* the amount of the said bonds, in a judgment which *Hummel* confessed to him. That the plaintiff was nevertheless sued by the said *Lincoln* on the said bonds, and was compelled to pay the debt due on them, to the amount of 265*l.* on the 11th of *December* 1801, of which the defendant had notice; but that the defendant had not indemnified him, &c.

The cause was tried at a Circuit Court for *Dauphin*, in *June* 1808, before Mr. Justice *Brackenridge*, who overruled two motions by the defendant, one for a new trial, the other in arrest of judgment; from both which decisions the defendant appealed.

The question upon the former motion was of no importance.

Fisher and *Montgomery* for the defendant, argued for the motion in arrest of judgment, upon two grounds: 1. That the promise of the defendant set forth in the second count, was *nudum pactum*, even granting that a sufficient forbearance was stated. 2. That there was neither a definite nor total forbearance stated on the part of the plaintiff, but merely a forbearance for some time, which was no consideration.

1. No consideration is sufficient to support an assumpsit, unless it import some loss to the plaintiff, or some benefit to the defendant; *Greenleaf v. Barker* (a), 1 *Pow. on Contr.* 344., 1 *Bac. Abr.* 266., *Com. on Contr.* 430, 431. Forbearance to sue, where a man has a cause of action, is clearly a good consideration; but if he has no cause of action at the time, it is otherwise, because in such a case the promisee sustains no loss, and the promisor has no benefit. *Barber v. Fox* (b), *Forth v. Stanton* (c). The *second* count states the consideration to be a forbearance by the plaintiff to sue his principal; whereas, by the face of the declaration, he could not sue him. He could have no cause of action, until he paid the

(a) *Cro. Eliz.* 194.(b) 2 *Saund.* 137. note 2.(c) 1 *Saund.* 211. note 2.

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EBERLEY. debt of the principal; *Tom v. Goodrich* (a); and the declaration states an apprehension that the plaintiff *would have to pay it*, which shews it was not done. *Non constat* that it ever would be done. The consideration was of course bad at the time of the promise, and the promise void; it was an engagement by the defendant without consideration, to pay *Hummel's* debt.

2. When forbearance of suit is the consideration of an assumpsit, it must be total and absolute, or for a particular time certain, or for a reasonable time, and so it must be stated, or it is ill. 1 *Pow. on Contr.* 353. The same principle in *Lutwich v. Hussey* (b), *Philips v. Sackford* (c), and 1 *Selwyn's N. P.* 43. The count merely states that the plaintiff would forbear, and the averment is that he did forbear, without shewing for what time; so that forbearance for an hour, would have been a performance on his part, which is no consideration.

Laird and Hopkins contra. The promise not to sue is after verdict to be intended a promise not to sue when his cause of action should arise, and so indeed it must be understood from the words of the count. The plaintiff told the defendant he was afraid he *should have to pay* the money, and that he *would sue* the principal; that is, that he would sue him when he should have paid. The forbearance to sue must relate to that time, and is as good a consideration as a promise to forbear, when the cause of action has already accrued. But in addition to this, the count states that it was a part of the agreement, that the defendant should include the amount of the bonds in his judgment, and that he did include them; so that here was a clear loss to the plaintiff, as he never could sue the principal.

2. As to the forbearance, it is alleged generally, which is the same as total forbearance, and so are the precedents. The case of *Mapes v. Sir Isaac Sydney* (d) is express, that a consideration to forbear, is to be intended a total and absolute forbearance; 1 *Sel. N. P.* 43. and the context of the declara-

(a) 2 *Johns.* 214.

(b) *Cro. Eliz.* 19.

(c) *Cro. Eliz.* 455.

(d) *Cro. Jac.* 654.

tion shews it was total, because after the defendant had taken the amount in his judgment, the plaintiff could never sue.

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TILGHMAN C. J. after stating the manner in which the promise was laid in the second count, delivered his opinion as follows:

It is objected on the part of the defendant, that this promise is void, for want of a consideration; that it is a mere gratuitous promise of one man, to answer for the debts of another. The principle on which cases of this kind turn, is very well settled. To make a consideration sufficient in law to support an assumpsit, there must be some *benefit* arising to the defendant, or some injury or loss to the plaintiff. A promise to forbear a suit against a man, against whom the plaintiff has no legal cause of action, is not a sufficient consideration. The declaration in this case is not expressed in terms altogether free from doubt. It is not clearly stated, whether the promise made by the plaintiff, was, to forbear an *immediate* suit, or to forbear to sue when his cause of action *should arise*. At the time of the conversation between the plaintiff and defendant, the plaintiff had no cause of action against *Hummel*, because he had not paid the bonds in which he was bound as his surety. But inasmuch as the plaintiff's expressions were, that he *should have* to pay the money, and that *he would sue Hummel*, I think it would not be going too far, to intend, after a verdict, that the promise was, that the plaintiff would forbear to sue *Hummel after he had paid* the money for him; and this, I have no doubt, would be a good consideration to support the promise of the defendant, to be answerable for *Hummel's* debt; because the forbearance to sue, after the cause of action attached, would be as great an injury to the plaintiff, as the immediate forbearance to sue, on a cause of action existing at the time of the promise. But the case does not rest entirely on this point. It is stated besides, that the defendant did, by consent of the plaintiff, include the amount of the debt for which the plaintiff was security for *Hummel*, in a judgment confessed to him by *Hummel*. Now after this, the plaintiff could never have recourse to *Hummel*. He gave up all legal redress, either present or future, under any circumstances which might arise. This was a manifest injury to

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himself. Whether the defendant could gain any thing by this arrangement, is altogether immaterial. That was a matter for his own consideration. It was very possible, however, that it might be an advantage to him in his transactions with *Hummel*. But, at all events, it deprived the plaintiff of all power to bring an action for his own indemnification against *Hummel*, even after he paid the bonds to *Lincoln*.

Another objection to the second count was, that it is not stated how long the forbearance was to be; but to this it has been well answered, that a promise to forbear in general, without adding any particular time, is to be understood a total forbearance; and there are many precedents to support an allegation of this kind.

I am therefore of opinion, that on the whole of the second count, there appears a sufficient consideration to support the defendant's assumption, especially after a verdict.

Thus much for the motion in arrest of judgment. The motion for a new trial depends principally on the evidence. Although I may not perfectly agree with every sentiment expressed by the judge of the Circuit Court in his charge to the jury, yet I cannot say that I see such substantial error, as would authorize this court to grant a new trial, for misdirection in point of law. Whether the verdict was or was not against the weight of the evidence, is not easy for us to decide; because the evidence was complicated, contradictory, and to be judged of in no small degree, by the character of the witnesses, of which we know nothing. The judge who tried the cause, says he is well satisfied with the verdict. Under such circumstances, I cannot think myself warranted in granting a new trial, on the ground of the verdict being *against evidence*. Upon the whole of this case, therefore, my opinion is, that the judgment of the Circuit Court be affirmed.

YEATES J. was of the same opinion.

Judgment affirmed.

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Lancaster,
Saturday,
June 2:

HANTZ *against* HULL and another.

THIS was an appeal from the decision of Judge *Brackenridge*, at a Circuit Court for *York* in *June* 1802.

The action in that court was a feigned issue to try the validity of a writing, dated the 21st of *March* 1798, and exhibited to the register as the last will and testament of *Henry Sealy*.

While the issue was depending, the defendants brought to the register another will of *Henry Sealy*, dated the 21st of *October* 1794, which was proved in the usual manner by the oaths of the subscribing witnesses. Upon a paper annexed to this will, the register certified, that the parties opposed to the will of 1794, were not present when the probate was taken; but that *Hull*, one of the defendants, informed him that they consented to the depositions being taken, upon condition that if the will of 1798 should be set aside, then the will of 1794 should stand for the last will of the testator.

Upon the trial of the issue the defendant's counsel offered in evidence the will of 1794 thus proved; and it being rejected by the court, they entered an appeal. The single question was, whether the probate, under the circumstances of the case, was valid, so as to make the will evidence.

Duncan for the defendants.

Bowie for the plaintiff.

TILGHMAN C. J. It was a singular proceeding in the register, to receive the probate of the will of 1794, while the will of 1798 was in litigation; nor can his conduct be justified, unless he acted by the consent of all parties interested. This consent is not proved, but by the assertion of one of the defendants. Nothing appeared on the trial, from which it could be inferred that the plaintiff had consented that the *ex parte* evidence of the witnesses to the will of 1794 should be admitted. On the contrary, to take the consent of the plaintiff, as it was stated to the register by one of the defendants, it

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only amounted to this, that if the will of 1798 was set aside, the will of 1794 should stand. But this is a very different thing from making use of the will of 1794 as evidence to destroy the will of 1798. The witnesses should have been produced in court, that the plaintiff might have had an opportunity of crossexamining them. The defendants' counsel suppose, that the will of 1794 having been *regularly proved*, it ought to have been read in evidence. But under the circumstances of this case, as they appear by the register's certificate, I do not consider this as by any means a regular probate. To make the most of it, it was only *conditional*, and not to be considered as of any effect, unless the will of 1798 was set aside. I am therefore of opinion that the evidence was properly rejected by the Circuit Court. The will of 1794 was not legal evidence, because it was not proved by any witnesses appearing in court.

YEATES J. It appears by inspection of the two wills of *Henry Sealy* dated 21st *October* 1794, and 21st *March* 1798, that they contain dispositions of the estate of the testator absolutely inconsistent with each other; and it has been admitted by the counsel on both sides, that they cannot stand together. I am at a loss to determine, what effect or operation the probate of the former writing could have upon the instrument executed three years and five months afterwards as a last will, supposing the testator to be then of sane memory, and that two witnesses attested it.

The two witnesses proved the will of *March* 1798 on the 12th of *April* following in the register's court, and at the prayer of the parties opposed thereto, an issue was directed to try its validity under the act of 13th *April* 1791. 3 *Dall. St. Laws* 98. When the facts are established by the return of a verdict, they cannot be reexamined on an appeal, by the express provision of this law. Pending this suit which was thus directed to be tried by a jury of the country, the writing which was offered in evidence on the trial of the feigned issue, was exhibited into the register's office on the 4th *December* 1799, and the witnesses sworn thereto, in the absence of the parties who set up the will of 1798. No rule had been entered for the taking of the depositions. No consent, either

written or verbal, was shewn on the trial, that they should be thus taken. But on the contrary, the certificate of the register is subjoined to the paper thus offered, that the depositions were taken by him on being *informed* by *Hull*, one of the defendants, that "his opponents had agreed they should be taken, upon condition that if the will of 1798 should be set aside, then the will of 1794 should stand for the last will of the testator."

This information certainly did not warrant the proceeding of the register. He was not justified in receiving the proof of the will of 1794, while the controversy respecting the validity of the will of 1798 subsisted, without some rule of court, or unequivocal consent of the contending parties, authorizing the measure. I cannot regard it as an act done in the line of his duty, but view it in no other light than if the depositions had been taken before any justice of the peace of the county. The procedure was wholly *ex parte*, and the adversary had no opportunity of crossexamining the witnesses, if the facts which they attested, could throw any light on the validity or invalidity of the will of 1798. It is clear to me, that the evidence offered was properly overruled by the judge who tried the cause, and that the judgment of the Circuit Court should be affirmed.

Judgment affirmed.

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SHARFF *against* THE COMMONWEALTH.

Lancaster,
Saturday,
June 2.

IN ERROR.

ERROR to the Quarter Sessions of *Dauphin*.

Upon an indictment for writing and publishing a libel on the characters of *A* and *B*, and also upon the memory of *C* deceased, the jury found the defendant "guilty of writing and publishing a bill of scandal against *A* and *B*, but not guilty as to any *C* deceased." Judgment reversed, because the defendant was not found guilty of the offence charged in the indictment.

Clerical errors may be amended in a criminal, as well as in a civil case.

The plaintiff in error was indicted for writing and publishing a libel on the characters of *Michael Ley* and *Leonard Ramler*, and also upon the memory of *John Ramler* deceased. The jury, many of whom were *Germans*, found the following verdict: "Guilty of writing and publishing a bill of scandal against *Ley* and *Ramler*, but not guilty as to any *Ramler* deceased."

Several errors were assigned and argued in this court; but the only one upon which the court thought it necessary to express an opinion, was, that the jury had not found the defendant guilty of the offence laid in the indictment, and that no judgment ought to have been entered upon their verdict.

Goodwin and *Fisher* for the plaintiff in error. This verdict does not find the matter in issue at all, or it finds it only by argument and inference, in either of which cases it is void. A bill of scandal, taking these words in any legal sense which can be given them, never can be synonymous with a libel, which is the offence charged, because, giving to each word its technical meaning, it is an indictment of slander; taking them in their popular sense and as a translation from the *German*, they mean a little scandalous report of less consequence than a libel. It requires an argument, and a refined one too, to make the finding and the charge the same; and this is never permitted even in a civil case; 5 *Com. Dig. Pleader* S. 22. 24; *a fortiori* in a case of this kind. It is impossible to say what the jury did mean; but if by any construction they could mean that which if expressed would acquit the defendant, the verdict is bad, and the judgment erroneous. *Rex v. Woodfall*. (a) Now it is clearly possible that they meant some other scandal than the libel in the indict-

(a) 5 *Burr.* 2669.

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ment, for there is nothing in the finding, which refers to the indictment. The court therefore, must intend, must *guess*, something which does not appear, in order to support the verdict; and this they cannot do. It is not the error of a clerk, in point of form; the verdict wants substance; but a verdict in a criminal case cannot be amended by the clerk's notes even where there is only a misprision. *Bold's case* (a) *The King v. Keite* (b). Neither can the objectionable part of the verdict be rejected as surplusage, because there is no complete finding without those words, any more than with them. The jury do not find the defendant guilty in manner and form as he stands indicted, but guilty of writing and publishing, which may well have been without malice, part of the essence of the crime. So that every way the verdict is bad.

Elder and Hopkins for the *Commonwealth*. There is nothing defective in this verdict, but the want of words of reference to the indictment; and this is a clerical error in entering the verdict, which may be set right, for there is no doubt that such errors may be amended even in criminal cases. Had the jury found that the defendant was guilty of writing and publishing a bill of scandal *as he stands charged*, where could have been the doubt? And yet these are merely technical words, which it is the duty of the clerk to add, and which in *The King v. Woodfall*, the court directed to be added. All incident and necessary circumstances may be supplied by intendment. 5 *Com. Dig. Pleader* S. 31. If upon an indictment for murder, that the defendant *feloniously* wounded A, of which wound he died, the jury find that the prisoner did give a wound to A, together with the circumstances which attended the giving it, and that he died of the wound, and then conclude, "if upon the whole matter the court shall be of opinion that the killing was murder, then we find the defendant guilty of murder in the manner it is charged in the indictment,"—this is a good finding, although it is not said that the wound was given *feloniously*; it must be intended. *Mackally's case* (c). 7 *Bac. Abr.* 31. By a construction still more natural it may be intended in this case, that the offence of which the defendant is found guilty, is the one

(a) 1 *Salk.* 53.(b) 1 *Ld. Ray.* 132.(c) 9 *Rep.* 68.

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referred to in the indictment, as no other offence was before the jury. If then the words *a bill of scandal* be so referred, the verdict is certain enough; if, as is said, their meaning cannot be ascertained, then they may be rejected as insensible. The verdict finds the issue without them; and wherever this is done, and the jury go further and find what is not in issue, the latter may be rejected. 7 Bac. Abr. 20.

TILGHMAN C. J. The counsel for the *Commonwealth* have considered the entry of the verdict as a clerical error, and as such, subject to amendment. There is no doubt but a clerical error may be amended, even in a criminal case. But there does not appear to be any clerical error in this instance. If there be an error, it is not of the clerk, but of the jury. We must suppose that the verdict was entered as it was given.

A bill of scandal is a singular expression. A good many of the jury were *Germans*; perhaps it is a translation from the *German* to the *English* language. The counsel for the defendant say, that according to the *German* understanding it means a scandalous report. For my own part, I cannot affix any definite meaning to it, and therefore I cannot say, that it is an offence of the nature of that, which is charged in the indictment. But that is not the only objection to this verdict. If it had said, guilty of the bill of scandal, with which the defendant stands charged, or even guilty of the bill of scandal, without more, we should have been certain that the jury referred to the indictment; and then perhaps it might have been fairly construed "guilty of the offence charged in the "indictment." But the words are guilty of *a bill of scandal*. *A bill*, is very different from *the bill*. Grammatical niceties should not be resorted to without necessity. But it would be extending liberality to an unwarrantable length, to confound the articles *a* and *the*. The most unlettered persons understand that *a* is indefinite, but *the* refers to a certain object. When the jury say, that the defendant is guilty of writing *a bill of scandal*, I am not assured that they mean the scandalous matter mentioned in the indictment; and I therefore cannot say, that they have found him guilty of the offence, for which he was indicted. This verdict ought not to have been received. The court should have informed the jury of its

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imperfections, and have desired them to express their meaning plainly. I am of opinion that the judgment is erroneous, because it does not appear on the record, that the defendant was found guilty of the offence charged in the indictment.

YEATES J. was of the same opinion.

BRACKENRIDGE J. The word libel is a translation of the word *libellus*, and means a little book, or paper. But it must be defamatory to make it a *libel* in the legal acceptance of the term. It must also be malicious. It is so defined by the commentator. 4 *Blac.* 149. "Malicious defamation of any person, made public by writing, printing, signs or pictures." Malice then is a necessary ingredient to constitute a libel. Malice must be laid in the indictment, otherwise there is no charge, to which the defendant would be bound to answer; no charge on the face of the indictment, which would warrant a sentence.

I admit this is not the doctrine of lord *Mansfield* in the case of *The King v. Woodfall*, 5 *Burr.* 2666. He asserts "that whether the paper was a libel, was a *question of law upon the face of the record*;" and he adds what he thinks proves it, "that after a conviction, a defendant may move in arrest of judgment, if the paper is not a libel." Doubtless, after conviction, the defendant may allege in arrest of judgment, that taking the fact as found by the jury, or implied in their finding, *viz.* that the writing was published by the defendant, it *did not amount to a libel*. For maliciously publishing, is a fact which must go to constitute the offence, and which must be found by the jury. He goes on to say "no proof of *express malice* ever was required, and in most cases is impossible to be given." That is all true; and the malice may be inferred from the writing. But it is the jury that must infer it. It is a fact that must be found by the jury; for maliciously publishing must be charged, and it is the whole of this fact that must be found. But it is fallacious to infer from this, that without such finding he could infer the guilt of libelling. Lord *Mansfield* laid down the inference of malice to be matter of law; but the doctrine was exposed by *Junius*. In his letter to lord *Mansfield* of

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Nov. 14th 1770, *Junius* observes: "The doctrine you have constantly delivered in cases of libel, is another powerful evidence of a settled plan to contract the legal power of juries, and to draw questions inseparable from fact, within the *arbitrium* of the court. In criminal prosecutions the malice of the design is confessedly as much the subject of consideration to a jury, as the certainty of the fact. Why force twelve men to pronounce a fellow subject a *guilty man*, when almost at the same moment you forbid their inquiring into the only circumstance, which in the eye of law and reason constitutes guilt, the malignity or innocence of his intentions? Your charge to the jury in the prosecution against *Woodfall* contradicts the highest legal authorities, as well as the plainest dictates of reason. It began as usual with assuring them that they had nothing to do with the law; that they were to find the bare fact, and not concern themselves about the legal inferences drawn from it; that the jury were not competent judges of *the law*, and that it did not fall within their jurisdiction; and that as to them, the malice or innocence of the defendant's intention, would be a question *coram non judice*. But with the simple information of common sense, I assert that if a jury, or any other court of judicature (for jurors are judges) have no right to enter into a cause or question of law, it signifies nothing whether their decision be or be not according to law. Their decision is in itself a mere nullity; the parties are not bound to submit to it; and if the jury run any risk of punishment, it is not for pronouncing a corrupt or illegal verdict, but for the illegality of meddling with a point on which they have no legal authority to decide."

These observations bear upon the point before us. For if malice is a fact which must be found by the jury, the first question here will be, has it been found? It is charged in the indictment, and the plea goes to it, *not guilty*. The finding guilty goes to the plea, and had nothing else been added, I admit that the words of reference *in manner and form* would have been included, and would have embraced the fact of *maliciously publishing*. But the generality of the term *guilty* is restrained by the special finding, guilty

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of a bill of scandal, and we are reduced to the necessity of inquiring what a bill of scandal is, of which the defendant is found guilty. *Billa vera* is an indorsement which the grand jury used to make upon the indictment, sent up to them, and now in *English, a true bill.* 4 *Black.* 305. A bill of scandal must therefore mean an indictment of scandal. Scandal, and slander, mean the same, in the language of the law. *Scandalous* and *slandorous* words; *scandalous* words that may subject a man to the penalties of the law; *scandalum magnatum*, or words spoken in derogation of a peer, a judge, or other great officer of the realm. 3 *Black.* 122, 3. *Esclandre*, is the word which is used in the statute 3 *Ed.* 1. c. 34, and which in the statute book is translated slander. 2 *Rich.* 2. c. 5. I take it to be the same thing therefore as if the finding of the jury had been, *guilty of an indictment of slander.* But whether the finding guilty of an indictment, will carry with it the finding guilty of the defamatory writing as laid in the indictment, that is the publishing maliciously, is not so conclusively certain, as not to require some astutia to make out, which I am not satisfied with using in a criminal case. And unless I could make out *malice* to be included, I could not say that the guilt was found. For the guilt of publishing does not include *maliciously* publishing. A libel might be innocently published by a man who could not read, and not knowing what it was; as if imposed upon him for an *old ballad.* And though he might give this in evidence, in which case the jury ought not to find guilt, yet there is a fallacy of lord *Mansfield* in the application of this principle in *Woodfall's* case. For though where the act is unlawful, the law implies a criminal intent, yet the intent is matter of fact, and unless on demurrer to evidence, as in other cases, it is left to the court, it is the jury only that can infer it.

But supposing guilty in manner and form as laid in the indictment, to be included in the finding in this case, the pinch remains still in the term, *a bill of scandal.* It is not *the* bill. *The* is an article which particularizes the subject of which we speak. A, an, one, any one, are all words of the same family. It is as if said, one *bill of scandal.* *Horne Tooke, Epea Pteroenta* 324. So that the term *a*, does not attach necessarily to the bill or indictment to be tried. It is impossi-

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ble not to have a strong inclination of mind to believe that the jury meant the indictment tried; but there is a possibility, that they might from their own knowledge have some evidence of, and might mean, another bill; and if such laxity in the finding was admitted, it might endanger the certainty of convictions, and let in a license to jurors to wander from the bill before them, and to think of other offences of a like nature, of which they might believe the defendant guilty. As in my knowledge in the western parts of *Virginia*, bordering on *Pennsylvania*, where, on an indictment for stealing sheep, they found the defendant guilty, because in their own knowledge, or from some evidence before them, he had stolen *wool*. They had thought that it all came to the same thing. Let the thing stolen be what it might be, he was a thief, and ought to be found guilty.

On this ground therefore I think the judgment must be reversed.

Judgment reversed.

Lancaster,
Saturday,
June 2.

Lessee of STEINMETZ against YOUNG.

A survey of 288 acres in the old purchase, made in 1788

upon a warrant for 100 acres issued in 1751, was returned into office before any other person had acquired a right, and was not objected to by the surveyor general. This is a

THIS was an appeal from the decision of the late Judge *Smith* at a Circuit Court for *York* in *May* 1808.

sufficient title to recover in ejectment.

It has been the practice in the land-office since the revolution, to accept surveys made even since the year 1767 upon old warrants, notwithstanding they contained more than ten per cent. surplus.

The plaintiff claimed under a warrant to *William Grouce* for 100 acres in the year 1751, founded upon an improvement. In *October* 1761 *Grouce* conveyed to *George Stevenson* and *George Ross*, describing the property as "a plantation and tract of land containing by estimation 300 acres more or less." A survey of 279½ acres was made on the warrant, by *Thomas Armer*, an assistant deputy surveyor, on the 26th of *February* 1764, which was never returned; and it

was clear from the surveyor's field notes, that the survey was not correct, because 159 acres of it were included in another survey made three days before by *Armer* for *George Ross* and company, who were still the owners of *Grouce's* warrant. On the 9th of *November* 1788 a survey of 287 acres 137 perches was made for the lessor of the plaintiff on *Grouce's* warrant, which he then owned, including but a small part of the first survey; and this was returned and filed in the surveyor general's office on the 16th of *April* 1790.

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The defendant gave some slight evidence of a settlement; and he offered to lay before the jury a warrant to himself, dated the 4th of *June* 1802, for "60 acres, including an improvement, interest to commence the 4th of *March* 1790," which was founded on an application, with a certificate from two associate judges of *York* county, that from the oaths of two persons it appeared "that the land had been improved twelve years and not before, that grain had been raised thereon, and that there was a house built thereon, and persons actually residing in it." This evidence was objected to, and overruled by the court; but the plaintiff's counsel afterwards gave permission to read it, which the defendant declined.

His Honour then gave it in charge to the jury, that if they should be of opinion the defendant had proved a settlement prior to the return of the plaintiff's survey in 1790, he would be entitled to their verdict. He stated the law to be, that if a survey were made, and before its return, the owner discovered that part of it was taken away by an older survey, he might for that, or other reasonable cause, lay it on other unappropriated land. But at the same time, he doubted on another point, which he would reserve for the consideration of the court in bank, namely, whether on a warrant for 100 acres, a survey of 287 acres in 1788 could be accepted.

The jury found a verdict for the plaintiff, which the judge refused to set aside; and the defendant appealed.

Hopkins for the defendant, contended first, that the judge had erred in rejecting the warrant, which had been offered in evidence. But the court was clear that this objection could not be taken, because although the warrant was at first re-

1810. **Lessee of STEINMETZ v. YOUNG.** refused, it was afterwards permitted, and the defendant declined reading it. He then argued upon the point reserved, that the survey in 1788 could not be maintained. He said that before the year 1767, the deputy surveyors were in the practice of returning much greater quantities than the warrant called for; and their surveys, notwithstanding the excess, were accepted. But that in that year, an order was made by the board of property, that no survey should be accepted which contained more than ten per cent. surplus, besides the usual allowance for roads; and the same restriction was in effect imposed by an act of the 8th of April 1785, which directed that surveys containing more land than was mentioned in the warrant, should be accepted, provided the excess was not more than ten per cent. 2 *St. Laws* 311. The act of 1785 he said was in many respects a general law. It extended to every part of the state, and therefore interposed a direct obstacle to the acceptance of the plaintiff's survey, which no practice or custom in the land-office could obviate. In *Kyle's Lessee v. White* (a), the court said, that if the survey in that case had been made at the present day, the objection founded upon its excess, would have been decisive.

Bowie and *Duncan* contra answered, that as the plaintiff claimed under a warrant and improvement, his improvement at that early day, would give him a right to survey 300 acres, as was admitted by the dissenting judge in *Kyle's Lessee v. White*; and they contended that if a man had a warrant for 100 acres before 1767, and settled and improved more than that amount, he was entitled to a survey for what he had settled. So far as the act of 1785 was in question, they said it had been solemnly settled that that act did not extend to the old purchase, in which this land was situated; and as to the instructions or order of the board of property in 1767, it had nevertheless been the custom of the land-office since to accept surveys on warrants issued before the revolution, containing more than ten per cent. surplus. That at all events it was a matter between the plaintiff and the land-office, where no objection had been taken to it; for

(a) 1 *Binn.* 246.

as to the defendant, he had not proved a shadow of title to any part of the land included in the survey. The warrantee had as early as 1761 asserted his claim to 300 acres; and in 1764 it was intended to carry it into effect by a regular survey. No person had suffered by postponing the survey; and the commonwealth had been a gainer by receiving a high price for the surplus, instead of the reduced price of the present day.

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TILGHMAN C. J. after stating the case, delivered the judgment of the court.

There is no doubt but that prior to the year 1767, a survey of 300 acres might have been made on a warrant for one hundred; such was the practice of the land-office. But in the year 1767, the board of property made an order, that no survey should be accepted, containing more than ten per cent. surplus above the quantity called for by the warrant, with the usual allowance of six per cent. for roads &c. An act of assembly to the same effect was made in April 1785; but as it has been expressly decided by this court in the case of *McGinnis's Lessee v. Albright*, December 1799, that this act does not extend to any part of the state, but that which lies within the last purchase from the Indians, it has no bearing on the present case. Judge *Smith* who had great experience in the business of the land-office, and was himself a deputy surveyor before the revolution, mentions in his charge, that he had himself surveyed 400 acres on a 300 hundred acre warrant, after the year 1767, which had been accepted, the party paying for the surplus; and that he knew of *no instance*, where a survey containing more than ten per cent. surplus had been *rejected* by the land-office, if it did not interfere with the rights acquired by others, before the return of the survey. It is certain that the proprietary officers were in the habit of sometimes dispensing with the general rules of office, where no injustice was done by it; and it is a striking feature in the present cause, that in the year 1761, *Grouce* considered himself as entitled to 300 acres on this warrant. At that time, he might have had his 300 acres surveyed; and if it was understood in the neighbourhood, that he meant to take 300 acres, or there were any lines, or marks, by which

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notice was given of the extent of his claim, I think it highly probable, that the proprietary officers would have accepted a survey for 287 acres, after the year 1767, provided he had stated his case to the board of property, and made it appear, that no other person had acquired an interest in the surplus. The acceptance of such a survey was a matter between the warrantee and the proprietaries. No third person could be injured. Nor has the present defendant the least particle of equity in his case. What is it to him whether the plaintiff had more or less land included in his survey?

I have endeavoured to ascertain the practice of our own land-office, since the revolution; and it appears that many surveys have been accepted, made since the year 1767, on old warrants, containing more than ten per cent. surplus. Considering all the circumstances of this case then, without laying down any general rule, it is my opinion, that the return of the plaintiff's survey, which was filed in the land-office, before any other person had acquired a right, and to which no objection was made by the surveyor general, gave him sufficient title to recover in this ejectment.

It follows, that the judgment of the Circuit Court is to be affirmed.

Judgment affirmed.

END OF MAY TERM, 1810.

APPENDIX.

CONTAINING

A FEW CASES IN THE HIGH COURT OF ERRORS AND APPEALS, &c.

HASSANCLEVER and others *against* TUCKER.

1803.

Monday,
January 10.

THIS cause was argued in the Supreme Court, upon a case in the nature of a special verdict, which stated in substance, that

Isaac Melchor being seised of estate real and personal, made his last will and testament on the 22d *May* 1788 in the words following: "It is my will that my just debts and funeral expenses be fully paid and satisfied by my executors hereafter named, as soon after my decease as possible. *Item*, I give and bequeath unto my niece *Maria Vandereen* the sum of 300*l.* money of *Pennsylvania*, to be paid her in gold or silver coin on the day of her marriage, or arrival at lawful age, which ever shall first happen, meanwhile to be placed out at interest from one year after my decease, on good real security, for her use, and in case of her death in an unmarried state, then to sink into my residuary estate. *Item*, I give and bequeath unto Miss *Eleanor Clifton* of *Philadelphia* the sum of 500*l.*

The testator ordered his just debts and funeral expenses, to be paid by his executors, and then bequeathed a legacy of 500*l.* to *A.*, to be paid her in one year after his decease, and in case of her death to be divided among her three sisters. He also devised specific real estate to *B.*, and a legacy of 100*l.* to be paid at lawful age, but in case of his death unmarried, the land and money to sink into his

residuary estate. The rest and residue of his estate real and personal he devised and bequeathed to his brothers and sisters their heirs and assigns as tenants in common, provided that his sister *M.* should keep the whole in her possession during her widowhood.

Held, that the testator having blended his real and personal estate, the real was subject to the burden of *A.*'s legacy, upon the deficiency of the personal; and that the legacy was not to wait for the expiration of *M.*'s life estate in the land, but to be paid in one year after the testator's decease.

APPENDIX. "money of *Pennsylvania*, to be paid her *one year after my*
 HASSANCLE- "decease, and in case of her death without issue, to be
 VER "equally divided among her three sisters, *Elizabeth*," (Mrs.
 v. "Tucker, the defendant in error) "*Mary, and Frances, or*
 TUCKER. "the survivors of them. *Item*, I give devise and bequeath
 "unto *Horatio Lawrence* and to his heirs and assigns, my
 "five tracts of land, situate at *Logotown* now called *Mont-*
 "morin in the county of *Westmoreland*, estimated at 3000*l.*,
 "to hold to him his heirs and assigns for ever; and I do
 "further give and bequeath unto him the sum of 100*l.* to
 "be paid to him at lawful age, meanwhile to be placed
 "out at interest on good security for his use; but in case he
 "depart this life unmarried, the devise of land, and bequest
 "of money to him made as aforesaid, shall be void, and the
 "whole sink into my *residuary estate*. *Item*, the rest and re-
 "sidue of my estate real and personal whatsoever and where-
 "soever, I give devise and bequeath unto my dear brothers
 "and sisters, *Adam Melchor, Jacob Melchor, Maria Hassan-*
 "*clever, and Elizabeth Shalkus* the wife of *Jacob Shalkus*,
 "their heirs and assigns for ever as tenants in common, and
 "to be equally divided between them share and share alike,
 "provided always that my sister *Maria Hassanclever* keep
 "the whole in her possession during her widowhood."

The said *Isaac Melchor* died seised of the said real estate in fee simple, and possessed of the said personal estate absolutely, on the ——— day of ——— at which time all the legatees and devisees in the said will named were living: Subsequent to his death, *Eleanor Clifton* one of the legatees in the said will named, died leaving no issue. There are no assets in the hands of the executors in the said will named, out of which the said legacies or any part thereof can be paid and satisfied; but the value of the lands devised, is to a greater amount than the legacies in the said will mentioned.

The question for the court was, whether the lands devised in and by the said will, were liable to the payment of the said legacies; and whether the said residuary devisees were chargeable therewith on account of the said devises, and of the lands, into the possession of which they entered after the testator's death. If the court should be of the affirmative opinion, judgment to be entered for the plaintiff; if not, judgment for the defendants.

The Supreme Court being of opinion with the plaintiff, the defendants brought a writ of error in this court, where by consent a supplementary case was added, which stated, that *Maria Hassanclever* at the time of the testator's death was and still remained a widow, and that the testator left a personal estate nominally adequate to pay his debts and legacies, but which in point of fact was insufficient.

If the court should be of opinion that the legacy was payable before the death or marriage of *Mrs. Hassanclever*, and was also chargeable upon the land, judgment to be entered for the defendant in error, with interest from the expiration of one year after the testator's death; but if chargeable upon the land, and not payable until one of those events, judgment to be entered for the defendant for the principal sum, with stay of execution till her death or marriage.

S. Levy and *Rawle* for the plaintiffs in error argued,
 1. That lands are not the proper fund to pay legacies, nor are they ever charged, unless it manifestly appears to have been the testator's intention, which was not the case here.
 2. That at all events the legacy to the defendant in error was not payable until after the death or marriage of *Mrs. Hassanclever*.

1. The instances in which chancery and our own courts have subjected lands to the payment of legacies, come within one of the following classes. Where the expressions of the testator are clear to that effect; *Tomkins v. Tomkins* (a), *Trott v. Vernon* (b), *Alcock v. Sparhawk* (c), *Astley v. Powis* (d), *Davis v. Gardiner* (e), *Thomas v. Brittnell* (f); or where he leaves no personalty, *Nichols v. Postlethwait* (g); or it is a provision for a wife or child, *Lypet v. Carter* (h); or where a fraud is intended by the residuary devisee, *Elliot v. Hancock*, (i); or lastly where the words of the testator, if applied to real estate, would charge it with debts; *Thomas v. Brittnell*, *Williams v. Chitty* (k).

In the present case the expressions are far from being clear

(a) *Prec. in Chan.* 397.

(b) *Id.* 430.

(c) 2 *Vern.* 228.

(d) 1 *Ves.* 496.

(e) 2 *P. Wms.* 187.

(f) 2 *Ves.* 315.

(g) 2 *Dall.* 131.

(h) 1 *Ves.* 499.

(i) 2 *Vern.* 143.

(k) 3 *Ves. jr.* 651.

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to that effect. The testator directs that his just debts and funeral expenses shall be paid, but says nothing about the payment of his legacies. He does not enjoin any one to see *his whole will performed*, as in *Alcock v. Sparhawk*; nor does he commence his residuary devise, *after my debts and legacies paid*, as in *Davis v. Gardiner*, *Tomkins v. Tomkins*, and *Trott v. Vernon*; but he gives the residue as a specific surplus of real and personal property not before devised. *Bagwell v. Dry* (a), *Doe v. Underdown* (b), *Hogan v. Jackson* (c), *Goodtitle v. Knott* (d), *Ridout v. Paine* (e). "The rest and residue here pass as a specific devise, in the same manner as the next preceding devise did to the devisee thereof, and are to be understood, the residue of what he had not before particularly devised, not the residue after debts and legacies paid." *Adams v. Meyrick* (f). The intention of Mr. *Melchor* is apparently the other way. If the land was to be charged with the legacies, why did he direct the legacy of *Maria Vandereen* to be put out upon *good real security*?

The testator was possessed of personal property; and therefore there is no presumption, as in the second class of cases, of a design to charge the land. The sum of 1500*l.* due from a debtor in France, was thought more than sufficient to pay the legacies; and although subsequent circumstances have overthrown the calculation, the probability that the testator did so calculate, is sufficient to shelter the lands, this sum of 1500*l.* being exclusive of what very nearly paid his debts. *Knightly v. Knightly* (g).

This legacy is not a provision for wife or child, as in *Lypet v. Carter*; on the contrary, it will encumber the property of a sister with a bequest of 500*l.* to one in no way related to him.

The residuary devisees have made no improper disposition of the fund legally chargeable with the legacies. The debts have been partly paid by the personal property, and the rest by the law of *Pennsylvania* must come upon the lands. But the pecuniary legatees cannot take the place of the debts

(a) 1 *P. Wins.* 700.

(b) *Willcs* 298.

(c) *Cowp.* 299.

(d) *Cowp.* 43.

(e) 3 *Atk.* 486.

(f) 1 *Eq. Abr.* 271. pl. 13.

(g) 2 *Ves. jr.* 328.

on the real estate. The devisees of the land are as specific devisees, and it was as much the testator's intention that they should have the land, as that the legatees should have their legacies. *Clifton v. Burt* (a), *Herne v. Meyrick* (b).

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Nor would the words of this will in *England* charge the land with the debts; à fortiori it cannot charge it with the legacies. *Thomas v. Britnell*, *Williams v. Chitty*, *Eyles v. Carey* (c), *Shallcross v. Finden* (d). The act of assembly, of 21 March 1772, 1 *St. Laws* 631, does not alter the case. It affords a remedy to the legatee, but it leaves the question as it stood, whether lands or chattels are to be the fund. Debts are undoubtedly chargeable on the lands, because as to them lands are chattels; but the doctrine of charging them with legacies, stands as in *England*, where a clear and manifest intention is always required.

2. *Maria Hassanclever* has an estate for life prior to the distribution of the residuum, and therefore prior to the payment of the legacies, if they are charged on that residuum. The testator has postponed his brothers and sisters to the life estate of this favourite devisee; and it is rational to presume the same limitation of his bounty to those not so near him. *Whole* means *whole estate*, and not *whole residue*. The antecedent words at the beginning of the clause, are not to be so imperative as to control the intention, collected with more certainty from the spirit of the will at large. *Phipps v. Annesley* (e).

Adams and Ingersoll for the defendant in error. 1. The intention of the testator is in this case the sole guide. He certainly designed to pay his legacies, and every line of the will proves that he intended to subject his whole estate to the payment. In the first place he has blended the two funds together, which is of decisive influence. *Roper on Leg.* 197. *Kidney v. Cousmaker* (f). The language of the lord chancellor is, "where a testator combines real with personal estate" generally, there is no doubt that all the burthens of the "personal, should be put upon this so combined with it. "There are many cases for that." If there is no fund but the

(a) 1 P. Wms. 678.

(c) 1 Vern. 457.

(e) 2 Atk. 58.

(b) 1 P. Wms. 201.

(d) 3 Ves. jr. 738.

(f) 1 Ves. jr. 444.

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real estate, it is agreed to be chargeable; what other result should there be when the testator treats both funds as one? In *England* land is more sacred than personalty, and to charge it with simple contract debts or legacies, requires the assent of the testator; but in this state it is as chattels for the payment of debts, and therefore should not be exempted with extraordinary care, from the same liability to legacies. In the present will, lands and personalty are confounded. The testator bequeaths legacies, devises lands, and in one clause, and to the same persons, he gives every thing of which he had not already made a disposition. There is no one of the cases read which comes up to this. In *Masters v. Masters* (a) the strong expression of the master of the rolls is, that the estate should be so marshalled, that as far as possible, *the whole will might take effect, and all the legacies be paid*. The testator has done the same thing by putting both funds into one. *Herne v. Meyrick* amounts to this only, that lands are not liable unless charged. *Clifton v. Burt* declares that the intention of the testator shall not be disappointed, the legacies being charged on copyhold. The case of *Clowdsky v. Pelham* (b) is stronger than the present. One devised land to A and the heirs of his body, remainder over, and in another part of his will bequeathed to A all his personal estate, and made him executor, willing him to pay his debts. Though the clause as to the payment of debts seemed to relate to the personal estate only, and though the lands were devised to the defendant in tail, and it was objected that tenant in tail could not be a trustee, yet the court decreed both real and personal estate to be sold for the payment of debts. Now the same words will charge legacies as well as debts, which makes this case conclusive. The funds are here given to the same persons, and the lands are in fee, so that it is a matter of indifference in the abstract, from which fund the legacies are paid, which was not exactly the case in *Clowdsky v. Pelham*. In *Eyles v. Carey* the charge upon the land was excluded by a special condition to pay a certain rent. *Thomas v. Brittnell* proves that an implied charge on real estate may be explained by a subsequent clause, which does not exist here. *Knight-*

(a) 1 P. Wms. 422.

(b) 1 Vern. 411.

ly v. Knightly was a bill to come upon the land specifically devised in the body of the will, to which this residuary clause cannot be compared; for here, "rest and residue," unlike the cases of *Doe v. Underdown*, and *Bagwell v. Dry*, is a floating sum, likely to be increased by the lapse of some of the legacies, and therefore uncertain. If all the legacies are paid, the residue must be less; if not, then more. Can a devise of this kind be called specific, or can there be a doubt that it must pay the legacies, when it is upon their payment, that its quantum depends? *Butler v. Freeman* (a), *Hockly v. Mawby* (b). The land devised to *Horatio Lawrence*, is a devise which might make *Knightly v. Knightly* applicable. What is meant by the residue of the personal estate? That which is left after payment of the debts and legacies. But "rest and residue" are applied to both funds. Can they include the payment of legacies in the one, and not in the other? Have they different meanings in the same sentence? It would be strange, says Lord *Kenyon*, if the same words should have different meanings when applied to real and personal estate. It is not so, if the estates are to go together to the same persons. 2 *Fearne* 195 (362). *Adams v. Meyrick* is a full recognition of the general rule, that "rest and residue" means after debts and legacies paid. The rule in *Doe v. Underdown* is correct, that things are to be taken as they were at the time of making the will; but here was a small personal, and larger real estate, the former insufficient to pay the debts within a very short time after the making of the will, and therefore probably so known to the testator. If the legacies, were not to be paid out of the land, they were a mockery of benevolence.

2. The second point is necessarily connected with the first; but there is in addition, a *time* annexed to the payment of the legacies. If the life estate is prior to the legacies, they cannot be paid within a year after the testator's death.

CHEW, President of the High Court. The court are unanimously of opinion with the defendant in error on both points; first, that the lands having been blended by the testator with

(a) 3 *Atk.* 58.(b) 1 *Ves. jr.* 151.

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his personal estate, are charged with the legacies, "rest and residue" meaning what was left after the payment of debts and legacies; and secondly, that the legacy in this case was not intended to wait for the expiration of a life estate, but was payable at the end of one year after the testator's decease.

Judgment affirmed.

High Court of Errors.

1807.

Lessee of ELIZABETH HAUER *against* PETER SHEETZ.

Philadelphia,
Saturday,
July 25.

The testator devised his plantation to his son *F.* and his heirs

and assigns for ever, subject to the payment of a sum of money, which he ordered *F.* to pay by instalments to his other son *P.* He also gave *F.* certain horses, cows, &c.; and then ordered that in case his son *F.* should die under the

lawful age of 21 or without issue, his share in the testator's whole estate should go to *P.*, his heirs and assigns; and if *P.* died under the lawful age of 21 or without issue, his share should go to *F.*, his heirs and assigns; and in either case, the survivor of his said two sons should then pay 500*l.* to the testator's daughter or her heirs. By a codicil he ordered *F.* not to sell any part of the land before he was 30, when he might do with it as he pleased.

Held that *F.* took a fee, with an executory devise to *P.*, to take effect upon *F.*'s dying under age and without issue; and *F.* having attained 21, and then died without issue, the estate descended to *F.*'s heir at law.

IN an ejectment for lands in *Dauphin*, the jury found the following special verdict:

"That *Peter Sheetz*, the father of the lessor of the plaintiff and of the defendant, being seised in his demesne as of fee, of the lands and tenements in the declaration of ejectment stated and mentioned, on the 8th day of *April* 1795 made his last will and testament, *prout* the copy thereof hereunto annexed, and on the 10th day of *April* in the same year, did make a codicil in writing to his last will and testament, *prout* the copy thereof hereto annexed, and died leaving the said *Francis*," (in the will and codicil mentioned) "the said *Peter* the defendant, and the said *Elizabeth* the lessor of the plaintiff, his only children; that the said *Francis* entered into and took the possession of the lands and tenements in the said declaration mentioned, and being so thereof possessed, died *without lawful issue*, but *after* he

“*was above the age of twenty-one years, intestate; that the said Francis Sheetz was born on the first day of April 1775, and was killed on the 28th of December 1797. That the said Elizabeth, the lessor of the plaintiff, is the sister of the whole blood of the said Francis, and that the said Peter the defendant is the brother of the half blood of the said Francis, being the son of the said Peter the testator, by another venter. That the said Elizabeth demised the lands and tenements in the said declaration mentioned, to the said Timothy for the term therein expressed; that the said Timothy did enter, and was thereof possessed; and that the said Peter did enter and eject him therefrom; and if on the whole matter, it shall seem to the court that the said Peter is guilty of the trespass and ejectment, they then find him guilty, &c.; but if on the whole matter, it shall seem to the court that the said Peter is not guilty, then they find him not guilty, &c.*”

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By the will referred to, the testator, after directing the payment of his debts, made the following devise. “I give and bequeath unto my son *Francis Sheetz*, all that my plantation, and two tracts or pieces of land,” (the premises in the ejectment) “the one of them, and whereon I now live, is bounded by &c. and containing about three hundred and sixty acres, be the same more or less; and the other of said tracts, is situated or bounded by &c. and containing about ninety five acres be the same more or less; both of the said tracts of land being situate in the township of *Heidelberg* and county of *Dauphin*, to have and to hold the said two tracts or pieces of land, unto my said son *Francis Sheetz*, and to his heirs and assigns for ever, subject to the payment of two thousand three hundred pounds lawful money of *Pennsylvania*, in gold and silver coin, which said sum it is my will, and I do give the same unto my son *Peter Sheetz*, and to his heirs and assigns for ever, and to be paid in manner following, to wit: my said son *Francis Sheetz* shall pay at the expiration of one year after my decease, the sum of one hundred pounds, and then the sum of one hundred pounds yearly, for three years successively, and then the next year the sum of five hundred pounds, and

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"the next year the sum of one hundred and fifty pounds, and
"then so on the sum of one hundred and fifty pounds yearly
"and every year, until the whole sum of twenty three hundred pounds shall be fully paid."

He then gave to his son *Francis*, "with the said plantation, and to his heirs and assigns," several horses and cows, a quantity of grain, and some farming utensils; after which came the following devise to his wife. "I give and bequeath unto my wife *Catharine* during the term of her natural life, my house and lot she now lives in, in the town of *Heidelberg*, and also all the money and effects which is mentioned and contained in a certain article of agreement or instrument of writing, made between her and me, bearing date the 19th day of *February* 1789, and recorded, &c. and which I have therein promised and agreed to pay and deliver her during all the term of her natural life, she paying the taxes and ground rent thereon to become due; and which said money in said agreement mentioned, being twenty four pounds yearly, shall be paid her on the first day of *May* yearly, during the term of her natural life, by my said son *Francis Sheetz*; and which my said plantation shall always be subject to." He also gave his wife during her life, the interest of six hundred pounds of his money, which he directed his executors to invest; and he then made this bequest to his daughter, the lessor of the plaintiff. "I give and bequeath to *Elizabeth*, now the wife of *John Hauer*, the sum of one thousand pounds lawful money of *Pennsylvania*, in gold and silver coin, nevertheless to be deducted out of the said one thousand pounds, what I have already given and advanced my said daughter *Elizabeth* and son-in-law *John Hauer*, which said money shall be paid my said daughter *Elizabeth* in manner following, to wit, three hundred pounds thereof, (besides what they now have) within six months after my decease, and then the sum of one hundred pounds yearly and every year, until the whole sum shall be paid." The money was to be paid out of the proceeds of an estate which he ordered his executors to sell; "but in case my said daughter *Elizabeth* should depart this life before the said one thousand pounds be fully paid her, then it is my will that my said executors shall

“ retain the rest in their hands, and put the same to interest
 “ for the children of my said daughter *Elizabeth*, until they
 “ be of lawful age of twenty-one years, and it shall then be
 “ divided between them, share and share alike.”

He also gave to *Francis*, “ and to his heirs and assigns,” the half part of all his clothing, linen, yarn, beds, and bedsteads: the other half, together with all the rest and residue of his moveable goods and effects, and money whatsoever and wheresoever, not before given and bequeathed, it was his will that his executors should make a public vendue of the same, and the money arising therefrom he gave and bequeathed to *Peter*, and to his heirs and assigns for ever. “ After the decease of my said wife *Catharine*, I give and bequeath the said sum of six hundred pounds, which my executors shall have so put to interest, unto my said two sons *Francis* and *Peter Sheetz*, to be equally divided between them, share and share alike. Also after the decease of my said wife *Catharine*, I give and bequeath unto my said two sons, my said house and lot of ground, and wherein my said wife *Catharine* now lives, situate in the said town of *Heidelberg*, to hold to them my said two sons, their heirs and assigns for ever. *But in case my said son Francis Sheetz shall die under the lawful age of twenty-one years, or without lawful issue, then and in that case I give my said son Francis's share in my said whole estate, unto my said son Peter Sheetz, and to his heirs and assigns for ever; and in case my said son Peter Sheetz shall die under the lawful age of twenty-one years, or without lawful issue as aforesaid, then and in that case, I give and bequeath my said son Peter's share in my said whole estate, unto my said son Francis Sheetz, and to his heirs and assigns for ever. But in either case, the survivor of my said two sons Francis and Peter, shall then pay unto my said daughter Elizabeth or her heirs, the sum of five hundred pounds, lawful gold and silver money, but to be taken out of the last payments of my first mentioned plantation.*”

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The *codicil* to the will contained an additional bequest of a servant man and boy to *Francis*, he to give one of his best horses to *Peter* when he should arrive at twenty-one; and then came the following clause. “ *And I do hereby*

APPENDIX. "order, and particularly request, and do not allow my said
 Lessee "son Francis Sheetz, to sell any part of the land, which I
 of "have in my said will given him, until he arrives at the age
 HAUER "of THIRTY years, and then he may do with the same as he
 v. "pleases."
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The judgment of the Supreme Court having been rendered for the defendant, the plaintiff brought this writ of error, upon which the single question was, whether *Francis Sheetz* took a fee-simple in the land devised to him, which became absolute upon his arriving at twenty-one.

Tilghman and *Lewis* argued for the plaintiff in error.

Francis Sheetz took a fee by the devise to him, his heirs and assigns. The subsequent words, that in case he should die under twenty-one or without issue, &c. gave an executory devise to *Peter*, to take effect upon *Francis* dying under age and without lawful issue; and as he attained twenty-one, the fee became absolute, unless limited in one respect by the codicil, as to selling before thirty.

It cannot be contended that there is any thing in the will, to reduce the fee of *Francis* to an estate tail with a vested remainder to *Peter*; on the contrary it was agreed below that he took a fee. The only question is, on what contingency was it to go over to *Peter*, by way of executory devise.

If it depended merely on the devise to *Francis*, and the first part of the devise over, as far as to "*Peter Sheetz* and to his heirs and assigns for ever," the contingency would clearly be confined to a dying under twenty-one and without issue. Or must be construed and, otherwise three consequences result, which the testator could not have intended. First, *Francis* might have died under age leaving issue, who would not have taken the land. 2dly, The words under lawful age must be rejected as having no meaning, the estate going over if he died without lawful issue at any time after twenty-one. 3dly, He could not charge the land after twenty-one for the payment of the money to *Peter*. The grammatical construction therefore violates the plain intent of the testator, which has always been held a good reason for rejecting it, and adopting the other. *Price v. Hunt* (a), *Walsh v. Peterson* (b), *Framling-*

(a) *Pollexf.* 645.

(b) 3 *Atk.* 193.

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Ham v. Brand (a), *Barker v. Sureties* (b), *Fairfield v. Morgan* (c). In *Cheeseman's Lessee v. Wilt*, in this court in the case of a will, and in *Massey's Lessee v. Rawle* in the Court of Appeals in the case of a deed, the same construction prevailed.

But the adoption of this as the contingency, it was said, opposes the general intent of the testator, and attributes to him a most improbable supposition, that *Francis* could have issue before twenty-one. And it was also said, that there are two other points of time for the devise over to take effect, one in the will, namely the death of *Francis* without issue living at that time, and the other in the codicil, his dying under thirty and without issue, one of which must be adopted.

It is to be premised, that as the first words give a plain estate in fee, absolute at twenty-one, it is not to be defeated but by words equally plain, or by necessary implication; such implication as is necessary to effectuate the manifest general intent of the testator. *Doe v. Perryn* (d), *Evans v. Astley* (e), *Chapman v. Brown* (f).

The general intent it is supposed was to exclude the lessor of the plaintiff; the evidence of which is, that the testator did not like her husband, and that she gets a legacy of 500*l.* out of the land, which is inconsistent with an intention that she should have the land. The first evidence of this intention does not appear in the will. The husband gets the 1000*l.* legacy, if it is paid to his wife during her life. The other has not the least weight, because she gets the legacy only in the event of the executory devise taking effect, which is no argument against her having the land by descent, if it does not take effect.

The improbability that the testator could have supposed that *Francis*, who was then twenty, might die under age, leaving issue, is an objection founded merely in conjecture. He had a year to marry, and to leave his wife enceint, which was not an improbable event. In *Fairfield v. Morgan*, the devisee was within fifteen months of age, and the objection,

(a) 3 *Atk.* 390.(d) 3 *D. & E.* 493.(b) 2 *Str.* 1174.(e) 3 *Burr.* 1574.(c) 5 *Bos. & Pul.* 38.(f) 3 *Burr.* 1634.

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though made, did not receive the least attention from the court.

The argument for confining the dying without issue, to the time of *Francis's* death, is founded upon the testator's direction, that the *survivor* of his two sons should *then* pay the 500*l.* to *Elizabeth*; from which it is inferred, that *Peter* was to take upon the death of *Francis*, and therefore the dying without issue meant issue living at that time. The whole turns upon the word *survivor*. Now the executory devise to *Peter*, whether it took effect at one time or another, did not depend upon his *surviving Francis*. If he had died before *Francis*, and before the estate became absolute, the chance of benefit by the executory devise would have descended to his heirs. *Jones v. Roe (a)*. If he had died before *Francis*, and then *Francis* died under age and without issue, the land would have gone to *Peter's* children, and yet *Peter* would not have been survivor. *Survivor* is used with reference to the subject matter, and means the son, or his representatives, who should take the whole; otherwise if *Peter* died, and then his children took, *Elizabeth* would lose the legacy. The only instance in which that term has been held to shew an intention that the estate should go over upon the death of the first taker, is where the person over took but a life estate. *Roe v. Jeffery (b)*. *Then*, is not an adverb of time annexed to the actual survivorship of *Francis* or *Peter*, for the legacy is to be paid out of the *last payment* with which the land was burthened; but it is annexed to the event of the whole estate, vesting in one of the sons, or his heirs. The term *survivor*, however is as well satisfied by our construction as theirs. The question is, at what time survivor? and we say upon the death of *Francis* under twenty-one and without issue.

The substitution of thirty in the codicil, for twenty-one in the will, is wholly without warrant, except as to the single power of selling. In fact, the restraint in the codicil, be it legal or otherwise, shews conclusively that the testator intended *Francis* should have an absolute fee-simple at twenty-one. It presupposes a right in *Francis* to sell at that time, and attempts to restrain it; but the restraint, even if valid, does not

(a) 3 D. & E. 82.

(b) 7 D. & E. 595.

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affect the quantity of *Francis's* estate; it would descend, and might be devised, in perfect consistency with the restraint. On their construction of the codicil, the restraint was unnecessary; for if it substituted thirty for twenty-one in all respects, *Francis*, unless he had issue, could not sell until thirty. There is not, moreover, a word in the codicil about issue; there is no contingency stated, or in view; even if he had issue, the testator intended to prohibit his selling. The estate is to become free, even from this restraint, at thirty. He may then do as he pleases with it: and what becomes of the argument, that it was to go over to *Peter* upon the death of *Francis* without issue living at that time, and of the argument for substituting thirty for twenty-one, which will make it go over upon his dying under thirty or without issue, that is at any time afterwards? The codicil applies only to the land given to *Francis*, and not to *Peter's* personalty, which conclusively shews that it does not respect the vesting of the fee by the will, for the limitation over is there the same to *Peter* as to *Francis*.

These supposed evidences of intention fall infinitely short of declaration plain, that the testator intended to defeat the fee of *Francis* after twenty-one, even if there was nothing to counteract them. But here the fee is strengthened by the strongest intention in its favour.

1. The limitation over extends to the horses, wagons, clothing, &c. of *Francis*, in their nature perishable, and which would not be in existence long. Would the testator make these the objects of an executory devise, to take effect at the distance of ten years afterwards?

2. As there are the same words in the devise over of *Peter's* estate to *Francis*, the personalty given to *Peter* is subjected to the same contingency. Did the testator intend that he should merely have the use of it up to the time of his death?

3. There is no stronger mark of an absolute fee-simple than burthening the devise with the payment of money. On principles of justice as well as of law, if a man pays for a thing, he ought to have it. By our construction, *Francis* would not have to pay until the fate of the executory devise was known, a year after the testator's death, when he would

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be of age. By the defendant's he must go on paying, without making terms or conditions, until near thirty, by which time he would have paid upwards of 1500*l.* to *Peter*, besides the mother's annuity; and then if he died without issue, *Peter* would take the land and the money too. This cannot have been the testator's intention. How could *Francis* have paid for the land without a fee? Who would have trusted him, if on dying under thirty without issue, the land was to go over?

Ingersoll argued for the defendant in error. He admitted that the intent of the testator must govern the construction; that there was no magic in particular words further than as they shewed the intent; and that *or* might be construed *and*, and *vice versa*, in order to effectuate the testator's purpose. But he contended, that for this very reason, cases upon wills had very little weight unless they were exactly in point, as was said in *Roe v. Grew* (a). They may serve to guide with respect to general rules of construction. But the intention being the polar star, it alone is the particular rule, which ought to be the most critically observed. *Gulliver v. Poyntz* (b). No technical form is necessary to convey the testator's meaning. No detached part of a will can be considered as giving the law to the rest. The meaning is to be collected from the will in question, by attending to the several parts of it, and by comparing and considering them together, without relying in any great degree upon decisions on other wills, or upon a particular in opposition to a general intent. *Strong v. Cummin* (c), *Throgmorton v. Holyday* (d), *Hay v. Earl of Coventry* (e), *Bridgwater v. Bolton* (f), *Robinson v. Robinson* (g), *Doe v. Dacre* (h). In this case *or* cannot be construed *and*, without defeating the testator's intention, as it is collected from the whole will.

A clear intention to keep the estate from the lessor of the plaintiff, or in other words, that it should not go to her upon the death of *Francis*, is manifest from his giving her a legacy out of this land in that event. The will contains evidence

(a) 2 *Wils.* 324.(b) 3 *Wils.* 143.(c) 2 *Burr.* 770.(d) 3 *Burr.* 1625.(e) 3 *D. & E.* 86.(f) 1 *Salk.* 237.(g) 1 *Burr.* 50.(h) 1 *Bos. & Pul.* 256.

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that he disliked her husband, as in case of her death, he gives even the remnant of the 1000*l.*, then unpaid, to his executors for the use of her children. He does not contemplate the death of *Francis* except under such circumstances as would either give the estate to *Peter* or to his own issue, in neither of which cases would she get it. His intention throughout was therefore that she should be excluded.

There are three periods at which the testator may be said to have intended that the devise over should take effect.

1. Upon a death under age *and* without issue, which is the plaintiff's argument. This however is not a plain, but an improbable intention, because the testator could not have contemplated a dying with issue under that age. In all the cases which have been cited, where *or* has been construed *and*, the reason for doing it has been a supposed intention in the testator not to leave the issue destitute, which intention could not be carried into effect by any other construction. But if the testator could not have contemplated issue, the argument falls. *Francis* was twenty years and eight days old at the date of the will, and was at that time unmarried; it was but a possibility that he should have issue before twenty-one, and therefore it cannot be said to have been plainly or even probably the intention of the testator to have provided for such issue.

2. Upon his death, without issue living at that time. This will support the general intent to keep the estate in the blood of *Francis*, or to give it over to *Peter* at the death of *Francis*, and thus exclude the lessor of the plaintiff. There is strong evidence that by the will the failure of issue was limited to that time, because the estate was to go over to *Peter* as survivor. An estate to *A* in fee, and if he dies without issue living *B*, then over, is a good executory devise. It is *Pells v. Brown* (a). The failure of issue is limited to the death of *A*. So here *Peter* as survivor was to pay 500*l.* to *Elizabeth*. It is not the survivor or his *heir* that was to pay, according to the plaintiff's argument, but it is "the survivor of my two sons shall then pay," which shews it to have been personal to the survivor, and in his life time. It moreover points out

(a) *Cre. Jac.* 590

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the time when it was to go over, *then*, being in this case an adverb of time, referring to the death of *Francis*, as was ruled in *Wilkinson v. South* (a). It is like the case of *Nichols v. Skinner* (b), which was a devise of portions of bank stock to the testator's four children, payable at their respective ages of twenty-one or marriage, and in case any of them should die before the time of payment, or should die without issue, then his share to the survivor or survivors. This was held to be such a dying without issue as that the survivors could take, which must be in their lives, and therefore good. The same principle in *Hughes v. Sayer* (c). That there being real property in this case will vary the rule of construction, is not so clear, since the late doubts of *Forth v. Chapman* (d) expressed by lord *Kenyon*. The construction being sound as to the personal property devised to *Francis*, it is hardly reconcilable to reason, that a different construction of the same words in the same will can square with the testator's intention. It is certainly left in doubt by what lord *Kenyon* said in *Porter v. Bradley* (e), and in *Roe v. Jeffery* (f). *Daintry v. Daintry* (g), *Richards v. Lady Bergavenny* (h), *Knight v. Ellis* (i), *Denn v. Shenton* (k). 2 *Fearne Cont. Rem.* 195. 209. Throughout the will the testator intends that the land shall be taken by survivor, as in the case of the house devised to the wife for her life, which after her death is given to his sons as joint tenants.

3. If the last period is not intended, the codicil at least changes the period of twenty-one in the will, and substitutes thirty. Supposing the construction on the will to be that the testator intended an absolute estate at twenty-one, the codicil postpones it to thirty; and whether it be read, under thirty and without issue, or under thirty or without issue, the law is equally with the defendant. The restraint upon the power of selling means that until that time the estate should not be absolute.

The payments to be made by *Francis* before thirty, are of no consequence; because where a testator intends that the

(a) 7 D. & E. 557.

(b) *Proc. in Ch.* 528.

(c) 1 P. Wms. 534.

(d) 1 P. Wms. 664.

(e) 3 D. & E. 146.

(f) 7 D. & E. 595.

(g) 6 D. & E. 314.

(h) 2 Vern. 324.

(i) 2 Bro. Ch. Ca. 577

(k) *Cramp.* 418.

estate shall go over upon a certain event, charging the devisee with payments will not alter the event. *Francis* took the estate with the chance of having it absolutely in a certain event, which was worth the payment. It no where appears that the money was to be raised out of the estate, though it was charged upon it; and therefore it cannot be argued that the testator intended it should be absolute at twenty-one, in order that *Francis* might raise the money out of it.

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TILGHMAN C. J. delivered the opinion of the court.

This case arises out of the will and codicil of *Peter Sheetz* deceased. Whether his son *Francis Sheetz*, also deceased, took an estate in *fee-simple* in the land devised to him, infeasible on his attaining the age of twenty-one, is the question. If he did take such an estate, then the *plaintiff*, his heir at law, is entitled to recover; if not, the law is with the defendant.

The testator devised to his son *Francis* two tracts of land, "to have and to hold the same to him and to his heirs and assigns for ever," subject to the payment of 2300*l.*, which he gave to his son *Peter*, to be paid as follows, viz: 100*l.* at the expiration of a year from the testator's decease, then the sum of 100*l.* for three years successively, the next year the sum of 500*l.*, the next year the sum of 150*l.*, and then each year 150*l.* till the whole should be paid. He also gave the said *Francis* sundry horses, cattle, sheep, implements of husbandry, and articles of household furniture. He gave his wife *Catharine* an annuity of 24*l.* a year for her life, to be paid by the said *Francis*, and charged the same on the lands devised to him. He also devised to his wife a house and lot for her life, and gave the same after her death to his sons *Francis* and *Peter* their heirs and assigns for ever. After that comes the following clause. "But in case my said son *Francis* shall die under the lawful age of twenty-one years, or without lawful issue, then and in that case I give my said son *Francis's* share in my said *whole estate* unto my said son *Peter* and his heirs and assigns for ever; and in case my said son *Peter* shall die under the lawful age of twenty-one years, or without lawful issue as aforesaid, then and in that case I give and bequeath my said son *Peter's* share in my said

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" whole estate unto my said son *Francis*, and to his heirs
" and assigns for ever; but in either case, the survivor of my
" said two sons (*Francis* and *Peter*) shall then pay unto my
" said daughter *Elizabeth* (the plaintiff) or her heirs, the sum
" of 500*l.*, but to be taken out of the last payments of my first
" mentioned plantation."

By a codicil dated two days after the will, " he ordered and
" particularly requested, and did not allow his said son *Fran-*
" *cis* to sell any part of the land which he had in his said will
" given to him, until he arrived at the age of thirty years,
" and then he might do with the same as he pleased."

I will first consider the will, unconnected with the codicil;
and then examine them together. The first devise to *Francis*
is a fee-simple, expressed as clearly as words can make it; ac-
companied too with an obligation to pay large sums of mo-
ney, which is inconsistent with an intent to give any estate
less than a fee-simple. Afterwards came the *qualification*,
that in case he should die under twenty-one, or without issue,
then and in that case the estate should go over to his bro-
ther *Peter* in fee. Here is nothing inconsistent with the fee-
simple first given to *Francis*. But the question is, how
are these last words to be construed? They contain two con-
tingencies, a dying under twenty-one, and a dying without
issue. Must they *both* concur, before the estate passes to *Pe-*
ter, or may he take on the happening of either? We are not
without authorities to assist us in the construction. Those ex-
pressions have often been used in wills, and often received
the consideration of courts of justice; and from the case of
Price v. Hunt, *Pollexfen* 645, in the year 1684, down to that
of *Hawkesworth's Lessee v. Morgan*, determined by the court
of King's Bench in *Ireland*, whose judgment was affirmed in
1805 by the British house of lords, the word *or* in cases like
the present has been construed *conjunctively*; that is to say,
it has been held that the executory devise over did not take
effect, unless the first devisee died under twenty-one, and *also*
without issue. The same construction was made in *this* court
in the case of a deed, in *Massey's Lessee v. Rawle*, and in
the Supreme Court, according to one of the cases cited,
Cheeseman's Lessee v. Wilt, in the case of a will.

But the defendant's counsel insist that wills are not to be

construed according to *adjudged cases*, unless directly in point; that every will depends on its own circumstances, and every will shall be construed so as to carry into effect the intention of the testator, provided such intent be lawful. These principles are sound, and the authorities I have mentioned are founded on them; for in order to effectuate the intent of the testator, the word *or* is stripped of its usual *disjunctive* signification, and converted into a conjunction copulative. Why has this been done? Because, if it was construed *disjunctively*, the devisee, who was the first object of the testator's bounty, might die under twenty-one leaving children, and those children would be deprived of the estate, which would pass over to other persons. It is very natural that a man should give his son an estate in fee, and yet provide that it should go to a third person, in case his son died without issue, and before the age at which the law permitted him to dispose of it, either by contract or by devise; but that he should give him a fee-simple, and then deprive his children of it because he happened to die before twenty-one, is altogether unnatural and improbable. The cases therefore that have been cited on this subject, stand on a foundation not to be shaken.

But granting that these expressions are *generally* to be construed as I have mentioned, still it is said, if there are any other parts of this will which indicate a contrary intention, the construction may be different. Undoubtedly it may. Let us see then what more there is in the will. The defendant's counsel rely on one fact not mentioned in the will, but found by the special verdict, which may be properly taken into consideration. It is this, that at the time of making the will *Francis* was twenty years and eight days old, and therefore it is said, the probability of his having issue before twenty-one was so small, that his father cannot be supposed to have regarded it. I do not see the force of this argument. It was very *possible*, and not very *improbable*, that *Francis* might marry, and either have issue, or have a wife pregnant, in twelve months from his father's death. We are to construe this will according to the situation of things at *the time it was made*, without taking subsequent events into consideration. It is worthy of remark too, that in the last adjudged case which was cited, *Hawkesworth's Lessee v. Morgan* in 1805, the first devisee

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wanted but fifteen months of being twenty-one years old, when the will was made. But no regard was paid to this objection.

Let us now see what effect the codicil will have, considered as connected with the will. *Francis* is restrained from *selling* his land till he attains the age of thirty. Whether this restraint on a fee-simple estate is consistent with the principles of law, is immaterial. We are endeavouring to discover the intent of the testator, and it is certain that he *intended* to lay the restraint. The defendant's counsel contend, that the age of thirty is to be substituted for the age of twenty-one annexed to the devise to *Francis* in the will, and then it will stand thus:—in case *Francis* dies without issue or before he attains the age of thirty, then and in that case *Peter* shall take. Now in the first place this is doing violence to the words of the codicil, for *Francis* was not to be restrained from *devising* the estate to whomsoever he might think proper, nor from any other act consistent with a fee-simple, save the power of *selling*. The testator must have had some reason for imposing this restraint. The most obvious one is, that he had discovered symptoms of a heedless and extravagant temper in *Francis*, which made it prudent to put it out of his power to *sell*, till he arrived at a very mature age; but it might be by no means necessary to debar him of the power of *devising* it, in case he died *before* thirty. But there are other parts of the will to be considered in deciding the effect of this codicil. If *Francis* had survived the age of twenty-one and lived to the age of near thirty, and then died, what in the mean time was to be done with the payment of his mother's annuity, and his brother *Peter's* legacy? They must have been paid. By the time *Francis* arrived at the age of twenty-nine, he would have paid 1720*l*. How was he to have raised this money, unless his estate in fee-simple had been absolute, on his attaining the age of twenty-one? And could the father have intended, that *Peter* should receive such large sums from his brother, and afterwards have all the land? It cannot be supposed. And yet it is to support an intent of this kind, that the words of the codicil are to be perverted from their natural meaning; whereas, if they are construed according to their obvious

sense, all inconveniences are prevented, and the will and codicil stand in perfect unison.

Upon the whole of this case it is the unanimous opinion of the court, that *Francis Sheetz* took an estate in fee-simple in the land devised to him, which became absolute when he attained the age of twenty-one years. Consequently the plaintiff, who is his sister of the whole blood, and his heir, is entitled to recover in this ejectment.

The judgment of the Supreme Court must be reversed.

Judgment reversed.

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High Court of Errors.

The INSURANCE COMPANY OF NORTH AMERICA,
against JONES and CLARK.

1807.

Philadelphia,
Thursday,
July 30.

THIS was an action of covenant upon a policy of insurance, dated the 30th of *November* 1797, upon all kinds of lawful goods laden or to be laden on board the brig *Benjamin Franklin*, "at and from Bordeaux to a port in the *United States*," 3,000 dollars at six per cent. The policy was in the usual printed form, with the following memorandum written at the bottom. "This insurance is declared to be made on the *freight* of the above brig, valued at the sum insured, for two thirds thereof, which the assured warrants to be *American* property, &c."

Seamen's wages and provisions incurred during an embargo, cannot be recovered as a partial loss from the underwriter on freight. They are general average.

The vessel sailed from *Bordeaux* on the 20th of *November* 1797; but before she got out of the river, she was stopt by an embargo, laid on by the government of *France*, which lasted until the 9th of *January* 1798. The embargo being withdrawn, she renewed her voyage and arrived in safety at *Philadelphia*, where she delivered her cargo, and received the full freight stipulated by the shippers.

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An expense of 875 dollars 13 cents was incurred by the defendants in error during the embargo, for seamen's wages, provisions, and extra pilotage, to recover which, under this policy on freight, they brought the present action.

The cause was tried at bar, in the Supreme Court, at December term 1802, when the counsel for the company tendered the following bill of exceptions to the opinion of the court delivered in charge to the jury by Chief Justice SHIPPEN.

"And now *to wit* &c. a jury being called, come *to wit* &c.
"who being duly impanelled, returned, tried, sworn, and affirmed, the plaintiffs, to maintain the issue, gave in evidence
"the policy, protest, and ship's register, *prout* the same respectively, and exhibited an account of the disbursements
"during the embargo mentioned in the protest, *prout* the account, all which evidence was admitted without exception
"on the part of the defendants. The plaintiffs admitted that
"after the embargo was taken off, as mentioned in the protest, the vessel proceeded in safety to *Philadelphia*, and
"there received the freight stipulated to be paid by the respective shippers of the cargo; but they contended that the
"expenses incurred during the embargo, were a direct consequence of the embargo, operating as a partial loss upon
"freight; that the same ought to be paid or reimbursed by
"the defendants in this action, so far as the interest of the plaintiffs: that the expenses of the embargo might either be
"estimated by the jury, upon a consideration of the time and
"the burthen of the vessel, or from the actual disbursement,
"which the counsel of the defendants agreed and admitted;
"and that the premium being for an insurance against the
"peril of an embargo, extended to a partial, as well as a total
"loss of the freight. But the defendants' counsel contended,
"that in point of law, the expenses incurred in consequence
"of the embargo ought not to be allowed to be recovered on
"a policy on the freight, as the vessel had returned to her
"port of delivery in safety, and had earned and received there
"her whole freight. And they contended that such an allowance would be contrary to an established and uniform usage
"among merchants and underwriters, which usage they endeavoured to prove by evidence to the court and jury.
"Whereupon the court in their charge directed the jury,

"that *unless such usage existed*, the expenses of the embargo
 "must be considered as a partial loss on the freight; and that
 "therefore, if an uniform commercial usage, such as was con-
 "tended for by the defendants, which would enter into the
 "essence of the contract, had been proved to the satisfaction
 "of the jury, the verdict ought to be for the defendants, other-
 "wise, *the verdict ought to be for the plaintiffs*; to which di-
 "rection of the court, the counsel for the defendants excepted,
 "and prayed the Chief Justice to set his seal &c., which he
 "did, and the jury found for the plaintiffs 725 dollars 30
 "cents with six cents costs."

The record being removed to this court, the cause was twice argued, first at *July Term* 1804, and again at the present term.

Tilghman and *Ingersoll* for the plaintiffs in error. The only question directly before the court, is whether the expense of seamen's wages and provisions, incurred during an embargo, can be recovered from the underwriter on freight as a partial loss. It may be material to consider another question, whether they constitute general average.

1. That they do not fall exclusively upon the underwriter on freight, is in the first place to be inferred from the novelty of the action, when the same foundation for it must so often have occurred. No precedent of the kind is to be found, and that of itself is an argument of great weight. *Le Caux v. Eden* (a), *Lord Montague v. Dudman* (b), *Litt. Sec.* 108.

The claim is also repugnant to the nature of the contract, All that the plaintiffs in error insured, was that freight should be received to the value of 3,000 dollars, and it has been received. No peril whatever has occurred to prevent the owner from obtaining every cent of the freight, according to the stipulation of the shippers; and if the peril of an embargo throws upon the insurer on freight the loss which the owner suffers by the increased consumption of provisions and disbursement for wages, so ought the peril of a *storm*, if by destroying a mast it leads to the same consequences. The thing insured in neither case sustains injury; and it is only against

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(a) *Doug.* 580.

(b) 2 *Ves.* 399.

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injuries to the freight specifically, that the contract protects. It cannot be reconciled with any legal notion of a loss, that where the whole freight has been received, the assured shall still recover for a partial loss of it. The supposition proceeds upon a misconception of the nature of freight, which is not a changeable, variable thing, like profits, being more or less in an inverse ratio to the expense of earning it, but is a distinct ascertained object, which remains the same, although the expenses should sweep away all profit. It is part of the owner's duty to take the expense upon himself, and with it the chance of its being greater or less. He is bound to provide a sufficient ship, and to maintain her in a perfect condition during the whole course of the voyage. *Abbott on Ship*. 283, 4. The very existence of the insurer's promise that he shall earn freight, depends upon his performing this duty; and therefore however a peril insured against as to the freight, the thing insured, may increase the expense of this duty which he takes upon himself, it cannot affect the underwriter. The latter has not insured against perils and all losses arising from them, but only against hurt and damage to the freight, which cannot have suffered detriment, as the whole has been received.

There is no case which opposes this reasoning; but the contrary. In *Dacosta v. Newnham (a)*, Buller J. says that the case of a vessel putting into port for the benefit of all, "is not like the case where a ship is detained by embargo, where the court have said that the expense (of seamen's wages and provisions) shall fall on the owner, and the freight shall bear it." In what case the court so said, cannot be ascertained. That they ever said the *policy* on freight shall bear it, cannot be shewn. If the meaning of *Buller* is, that the loss of both seamen's wages and *provisions* may be recovered upon the policy on freight, it is contrary to *Brough v. Whitmore (b)*, where it was held that provisions are included in the policy on ship, under the term *furniture*; and certainly they cannot be included in both policies. His meaning must have been, that the owner lost the expenses in consequence of which he earned freight, and therefore that the freight was his indemnity. But whether or not, it is merely a *dictum*.

(a) 2 D. & E. 414.

(b) 4 D. & E. 210.

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In *Robertson v. Ewer* (a) it was decided only that wages and provisions during an embargo, cannot be recovered on the policy on *ship*; not that they can be recovered on the policy on freight. But the ground of the court's opinion is in our favour; they look to the subject of insurance, and if that is safe, there is no remedy under the policy.

The same point is all that was decided by *Buller* in *Eden and Court v. Pool*, mentioned in a note to the former case, and also in *Park* 54. Mr. *Park's* statement that Judge *Buller* held the freight to be liable, is contradicted by *East* in a note to *Sharp v. Gladstone* (b).

Magens says, that in a war between *England* and *Spain*, a fleet of merchant ships from *Carthage* and *La Vera Cruz* were embargoed above a year at the *Havanna* by order of the *Spanish* court; and notwithstanding the expense of maintaining a ship's crew there ran very high, yet the owners of the ships had no recourse against any of their insurers; and he denies that it was even general average. 1 *Mag.* 68.

In *Thompson v. Rowcroft* (c), a case of the *Russian* embargo, where the ship owner, upon receiving a total loss upon freight, agreed to assign his right of recovery to the underwriters, and also made a similar agreement with the underwriters upon ship on receiving a total loss from them, and he afterwards received the freight, he was compelled to pay it all over to the underwriters on freight, without any deduction for seamen's wages and provisions during the embargo; because they were charges on the owner before the abandonment, and upon the underwriters on the ship afterwards. This is a decision that the underwriters on freight are not liable for such expenses.

In *M'Arthy v. Abel* (d), another case of the same embargo, the owner abandoned both ship and freight to the respective underwriters, and at the end of several months the ship arrived safe and earned her entire freight, which was paid to the underwriters on ship. The court held that the plaintiff could not recover upon the policy on freight; and lord *Ellenborough* in delivering judgment said, "if the fact

(a) 1 *D. & E.* 130.(c) 4 *East* 34.(b) 7 *East* 33.(d) 5 *East* 388.

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"be merely looked at, freight in the events which have happened has not been lost, but has been fully earned and received by or on behalf of the plaintiff, the assured; and if so, no loss can be properly demandable against the underwriters on freight, *who merely insure against the loss of that particular subject by the assured*. But if it can be considered as lost in any other manner or sense, it has been lost by the plaintiff's act in abandoning the ship." In this case too there were expenses for seamen's wages and provisions during the embargo, which were not recovered from the underwriters.

And in *Sharp v. Gladstone* (a) where the present question was expressly made, there is nothing from the court which favours the exclusive claim upon the underwriters on freight, but lord *Ellenborough* evidently inclines to the opinion that the wages and provisions are at most but general average.

2. Are the wages and provisions general average? There is certainly no adjudication that they are, although the opinion of Mr. *Park* seems to be in favour of it. But unless the owner is to bear them alone, they must be. All losses which arise in consequence of extraordinary sacrifices or expenses incurred for the preservation of ship and cargo, come within the description of general average. *Park* 170. Average, says *Marshall*, is a contribution made by the owners of the ship, freight, and goods on board, towards any particular loss or expense incurred for the general safety of ship and cargo. 2 *Marsh.* 460. The definition of *Magens* is much the same. 1 *Mag.* 64. The expenses of wages and provisions after capture, have been held to be general average, upon the principle that it is for the general benefit that the crew should be kept together, to navigate the ship in case of acquittal. *Leavenworth v. Delafield* (b). It is not easy to raise a distinction as to this point, between capture and embargo. It is as much for the interest of all in one case as in the other, that the crew should be kept together; and it may be urged moreover, that it is a part of the owner's duty, from his covenant in the policy, to sue, labour, and travel, &c. to the expense of which the underwriter binds himself to contribute. Against their being general average there are however respectable opin-

(a) 7 *East* 34.

(b) 1 *Caines* 573.

ions, and it is immaterial to us in this case, as it is not an exclusive charge on the freight.

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Sergeant and Dallas for the defendants in error argued,

1. That a loss had been occasioned to the subject matter of the insurance, which by the spirit and terms of the contract, they were entitled to recover as a partial loss of the freight.
2. That it was not of the nature of general average.

1. The objection to the novelty of the action has no weight as applied to a question of right, however it may be as to a question of form. The first instance of an action at common law by a ship owner against the owner of cargo, to recover a contribution to an average loss, is that of *Birkley v. Presgrave*, reported in 1 *East* 220., where this objection did not receive the least countenance. The law would be a strange science if it were decided on precedents only. On the contrary, it is the glory of the law, that while its principles are as immutable as the foundations of justice, its modes of relief are as various and as flexible, as the injuries of men, or the fluctuations of commerce can require them to be. Affirmative precedents may shew what the law is; the want of them can never shew what it is not.

The question in this, as well as in every other claim upon a policy, is whether the insured has been injured by one of the perils insured against, and to what extent. It is of no consequence what is the subject matter of insurance, whether ship, freight, or cargo; it must be governed as to the question of loss, by the same principles. The object in all insurances is the same. In the case of ship and goods, it is their arrival at the port of destination, without prejudice from any of the perils in the policy. Injuries to them are generally quite palpable, and therefore easily apprehended. In like manner the object of insuring freight, is to prevent prejudice to it from any of the perils enumerated, although from its abstract nature, the injuries it receives are not so striking, and therefore not so easily apprehended. The principles applicable to it, must therefore be the same as those which govern insurances on ship and goods, a due regard being had to the different nature of the subjects. It is like them exposed to partial as well as total loss, and like them may suffer a partial loss which is

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not attended by any actual subtraction from the thing itself. The objection then that we have received full freight, goes too far. It extends to every sort of insurance, and would exclude the owners of ship and cargo from recovering, where they had received the specific thing insured, however charged or burdened in consequence of perils, as by salvage, and general average. It is not the receipt of the specific thing which is insured; but it is its exemption from damage, diminution in value, or prejudice, by certain perils. Has then the subject of this insurance suffered injury? In what does the subject consist? In the earnings of the ship, computed at two thirds of a given sum, one third being deducted for wages and provisions of the voyage; or in other words in the profits of the ship in the voyage. The ordinary expenses of the ship, which generally are equal to one third, are a charge upon the gross freight, and the balance is the nett earning of the ship, which is insured. The spirit and meaning of the contract are that this nett earning shall be exempt from all deductions, and from all damage occasioned by the perils insured against; and although the thing be specifically received at the completion of the voyage, yet if it be received with the burden imposed by a peril in the policy, it is not exempt from deduction. As far as an abstract thing can suffer damage, it suffers it, as a part of the gross sum is consumed by a peril. The freight insured is the nett freight after making the usual deductions; the freight received is less, in consequence of the embargo; the policy is not a contract of indemnity unless it makes good the loss.

But the owner is said to take the expenses upon himself. That however is the case only in the course of the voyage. Delay by storms is at his risk. But an embargo while it lasts interrupts the voyage; and it is no part of his obligation to the insured, to sustain the expenses incurred during an interruption of the voyage, produced by a peril. This is the distinction taken by *Buller in Brough v. Whitmore* (a), to reconcile *Robertson v. Ewer* to the case then before the court.

It is moreover universally true that whatever will justify an abandonment, and entitle the insured to recover a total loss, will, if he does not choose to abandon, entitle him to re-

(a) 4 D. & E. 210.

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cover as a partial loss, any expenses or damage it may occasion. *Park* 78, 79, 80., 2 *Marsh.* 479, 483, 484., *Rotch v. Edie* (a). No doubt the defendants in error might have abandoned. The embargo was a peril which they were at liberty to consider as a total loss of the freight. Expenses, which were a direct consequence of the embargo, and which were payable out of the freight, must therefore be considered as a partial loss of it.

How is the case affected by authorities? There is no case which says that the expenses are not a loss, for which the assured is entitled to an indemnity. In *Robertson v. Ewer* the opinions of all the judges shew, that although the policy on ship did not cover it, yet that the assured was entitled to recover it under the policy on that subject out of which seamen's wages and expenses were paid. In *Dacosta v. Newnham* it was the express opinion of Judge *Buller*, whose mere dictum would be a great authority; but he says it was so determined by the court. He cannot be understood to mean that the owner must bear the loss, for then his concluding words are absurd; it is the freight that is to bear it, and if so, the policy on freight. Nor does he contradict any decision in saying that it must bear both seamen's wages and provisions; for provisions consumed during an embargo are not covered by the policy on ship, as was held in *Robertson v. Ewer*. *Brough v. Whitmore* was a recovery for loss by fire in the course of the voyage. In *Eden v. Poole*, *Park* 54., the same opinion is repeated by *Buller*, that the freight is liable.

In the case from 1 *Mag.* 68. it does not appear that there was any insurance on freight.

In *Thompson v. Rowcroft* the decision turned altogether upon an agreement by the assured to assign his whole freight to the underwriter.

In *M^rArthy v. Abel* the whole question was the right of the plaintiff to recover a total loss after an abandonment of ship and freight, when the freight had been subsequently earned.

And in *Sharp v. Gladstone*, the question related to expenses incurred after an abandonment.

APPENDIX. 2. The right of the assured to an indemnity drives the opposite counsel to an argument that the loss is general average; but this is against the sentiments of writers of high authority, and against express decision. The rule of the *Rhodian* law is, that "if goods are thrown overboard to lighten a ship, the loss incurred for the sake of all, shall be made good by the contribution of all." All the cases of general average are corollaries from this rule: *Park* 121, 122., *Abbott* 273., 2 *Marsh.* 460; and it must be constantly referred to, to understand them. The rule is founded both in equity and sound policy. Its equity consists in compelling all to bear part in a loss voluntarily incurred by one for the general benefit; its policy in the inducement it offers to consent to the sacrifice. Where there is neither equity nor policy in requiring a contribution, there is no foundation for applying the rule. If the motive is to save all from an impending peril, then the loss is general average; not else. Intention, determination to produce the effect by the sacrifice, is therefore essential, whether formal consultation be so or not; and the peril must not already have happened, or the intention cannot exist. Here the owner of the freight did not act voluntarily; he merely submitted to what he could not resist, as his contract with the seamen was in full force. There was no impending peril, for the whole danger had actually happened. The payment of wages could not by possibility diminish the danger, which consisted in detention only; and therefore there was no intention to diminish the danger. Such a case does not come within the rule of general average. It is accordingly so held by *Buller* in *Dacosta v. Newnham*, by *Abbott*, 222., by *Magens*, 1 vol. 68., and so it was decided by the Supreme Court of *New-York* in *Penny v. New-York Insurance Company (a)*. Expenses incurred for the general benefit after a capture, do not present an analogous case. They however are not properly speaking an average at all. By the capture the charter-party is dissolved, the relation of the parties and their consequent obligations are destroyed, and of course the ship owner is no longer bound to retain and support the crew. What is done by one of them for the general benefit, before advice, does not stand upon

(a) 3 *Caines* 155.

the footing of the marine law of average, but upon that of services rendered, for which the law implies a promise to compensate, or upon the footing of the special clause in the policy.

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TILGHMAN C. J. delivered the court's opinion.

It appears by the bill of exceptions in this case, that the question is simply this: are the expenses and disbursements for seamen's wages, provisions, &c. during the time the defendants' ship was detained by an embargo at *Bordeaux*, to be considered as a partial loss, for which the underwriters on the freight are liable?

It is contended by the counsel for the plaintiffs in error, that these expenses fall upon the owners of the ship, and are not covered by the policy; but that at all events, if the underwriters are in any manner liable, the loss must be considered of the nature of general average. Although one would suppose the case must frequently have occurred, yet we find no precedent of any such action as the present, nor any decision directly in point, either in *England* or in this state. There is a difficulty attending subjects of this kind, arising from the abstract nature of freight; and from this circumstance, that although the freight is earned by the ship, and both ship and freight generally belong to the same person, yet they are allowed to be the subjects of different insurances. In *France* and some other countries, insurances on *freight* are not permitted. A ship is an object of the senses. Every one understands in what manner it may suffer damage. But when we speak of a damage sustained by *freight*, we may easily be led to misconceptions. What is an insurance on freight? It is an engagement, say the insurers, that the ship shall complete her voyage, and earn the freight, and the freight being earned, the engagement is fulfilled. On the other hand, the assured contend, that although the whole freight has in fact been earned, yet it has been subject to considerable expenses, occasioned by one of the perils insured against, and that by the true construction of the policy, the insurers are bound to make good the whole freight clear of these expenses. It is certain that an embargo is a peril insured against, and that extraordinary expenses were occasioned by it. But it does not

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follow of course, that these expenses are all chargeable to the freight, although they may have been paid by the owners of the ship, who are entitled to receive the freight. The ship being restrained by the embargo, it was for the interest of all persons concerned in ship, freight and cargo, that the crew should be retained for the purpose of taking care of every thing; and in this point of view, the extraordinary expenses might in equity be apportioned among the several persons, who derived benefit from them. As to the loss by consumption of *provisions*, it seems by no means clear that it is applicable entirely to the *freight*, because provisions are appurtenant to the ship, and where there is an insurance on the ship and *her furniture*, it has been determined, that the stock of provisions laid in for the voyage, is covered, and in case of loss, may be recovered on such insurance.

The *assured* rely on the opinion of respectable judges, that the loss falls exclusively on the freight. Those opinions it will be necessary to consider.

In the case of *Robertson v. Ever*, 1 D. & E. 127., it was decided, that on a policy on a *ship*, the insured could not recover expenses for seamen's wages and provisions, during an embargo; and this was the only point decided. Nothing is said about freight.

The same point precisely was determined by Judge *Buller* in *Eden and Court v. Poole*, 1 D. & E. 132., *note*; and although it is said by *Park* 153., that *Buller* declared the *freight* and not the ship was liable for the loss, yet it is evident that if he did say so, it was an extrajudicial opinion, for no such point was before him. There is reason to suppose however that that learned judge did not express himself in the manner mentioned by *Park*; for Mr. *East* in a note to the case of *Sharp v. Gladstone*, 7 East 33., says that on examining his own manuscript note of *Eden v. Poole*, he finds it only stated that Judge *Buller* was of opinion that those charges were not allowable on *such a policy* on a *ship*, and that he gave no opinion as to the exclusive liability of the freight.

In the case of *Dacosta v. Newnham*, 2 D. & E. 414., Judge *Buller* is reported to have said, "this is not like the case of a ship detained by an embargo, where the court

have said the expenses shall fall on the *owner only*, and “the *freight* must bear it.” But in what case the court so said we are not informed; certainly we can find no case where they so *determined*. These are the principal English authorities relied on by the defendants in error. They are no more than the *sayings* of judges, certainly very respectable; but these sayings are often mistaken and misrepresented, and even when truly reported, must not be put in competition with solemn judgments. We see that in neither of the above cases did the question come *immediately* before the court, how far the insurers on freight were answerable for losses of this kind. But that question has been brought more immediately in view *lately*, and *since* the decision of this cause in the Supreme Court.

In the case of *McCarthy v. Abel*, 5 East 388, 397., the assured abandoned both ship and freight to the different underwriters, on receiving information of an *embargo*. The ship afterwards performed her voyage and earned the entire freight. The assured sued for a total loss, and it was adjudged against him, because in the event which happened, the freight was not lost, but fully earned and received by or on his behalf.

In the case of *Sharp v. Gladstone* too, 7 East 34., where the subject of freight was before the court, it did not seem to be their opinion, from what fell from them, that freight should be exclusively liable to losses of this kind.

We do not find then any express authority that this loss can be recovered in any shape. That it cannot be recovered from the insurers on the freight *exclusively*, may be strongly inferred from the nature of the contract, which engages that the freight shall not be lost, and in fact no part of it has been lost. *Park*, one of the most accurate writers on insurance, seems to have no idea that the freight *alone* is *liable*, but states it as a question *undecided*, “whether the extraordinary wages “and victuals expended during an embargo, ought to be “brought into a *general average*, so as to charge the under- “writer.” He supposes that lord *Mansfield* inclined to the opinion that they might, and gives his reason for such supposition. The *criterion* of general average is, were the expenses *necessarily* and unavoidably incurred for the *general safety*

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of the ship and cargo? Although the decision of this point is not absolutely necessary at present, yet as it may be useful to settle it by the highest judicial authority in the state, it has been thought proper to have it declared as the opinion of a majority of this court, that the expenses incurred during the embargo at *Bordeaux*, should be brought into a general average.

Upon the whole, it is the opinion of a majority of this court, that the judgment of the Supreme Court be reversed.

RUSH, President. A general question, interesting to commerce, important in its principles, and heretofore universally confessed to be an undecided point, is brought before this court by writ of error; and we are called upon to determine whether an insurer on the *freight* who underwrites a *particular* sum, which has been received by the insured, is *exclusively* obliged to pay the expense of provisions and mariners' wages arising from an embargo.

The material facts are these: The Insurance Company of North America insured 3000 dollars freight on the brig *Benjamin Franklin*, on a voyage from *Philadelphia* to *Bordeaux* and back, and have covenanted in the policy against the usual perils "by arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality, soever." The ship and cargo were also insured against the same perils. While the ship lay at *Bordeaux*, she was detained by an embargo; and the expense of such arrest and detention has been estimated at 875 dollars and 13 cents. As soon as the embargo was taken off, the ship proceeded on her voyage, and having arrived safely in *Philadelphia*, the 3000 dollars freight were received by the insured. It is not alleged, that the ship, cargo, or freight, sustained any other loss but what arose from the embargo, in wages and provisions.

Upon the trial of the cause the court below were of opinion and so charged the jury, that the expenses of the embargo, were a *partial* loss on the freight, that is, they were *not* an average loss; in consequence of which the jury gave a verdict for the insured for 725 dollars and 30 cents. To this opinion the insurance company tendered by their counsel a

bill of exceptions, and have brought their writ of error from the Supreme Court.

The question is not whether the insured shall recover the expenses of the embargo? That in my opinion is certain. But the question is, *who* shall pay them? Is the insurer in the present case solely bound to pay them, according to law and a fair construction of the policy? I will inquire,

1st, Does an insurance on the *ship* cover the expenses of an embargo?

2d, Is an insurer on the *cargo* liable for such expenses?

3d, Can an action be supported for such expenses against an insurer who underwrites a precise or fixed sum on the freight, which has been received?

4th, If the insurers on the *ship*, *cargo* and *freight* be not in the present case separately liable for the expenses of the embargo, are they jointly answerable on the ground of *general average*?

Is the insurer on the *ship* liable for the expenses of an embargo?

That he is not liable is evident from the nature of the contract, and express adjudications on the subject.

A policy is a contract in writing, by which the insurer, for a reasonable compensation, engages that certain property of the insured, specified in the policy, shall sustain no loss or damage from any of the perils enumerated in the contract between the parties.

To found a claim upon the policy, the insured must prove, that the identical property *specified* has been destroyed or lessened in value by some of the perils mentioned in the policy. When the property insured arrives safe without damage from any of the perils stated in the policy, the insurer has complied with the contract, and law and justice can demand nothing more of him. The insuring party can never be called upon to answer for a breach of contract, where no breach of contract has taken place. To make the insurer on the *ship* liable, there must not only be peril to the ship, but she must receive loss or damage *from* the embargo. When there is no actual loss to the ship occasioned by the embargo, it is the same thing as if she had arrived safe after the perils of a storm, enemies, or pirates; in which cases, there is no

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pretence to say the insurer is liable, if the ship receives no damage. The peril of a *storm* and the peril of an *embargo* are the same thing to the insurer of the ship, after she has returned in safety to her port.

In conformity to these remarks, and with a spirit of perfect justice and propriety, it has been decided on several occasions, and particularly in *Robertson v. Ewer*, 1 Term 127, that the insurer on the *body of the ship* is not liable for provisions and sailors' wages, during an embargo. In this case Justice Buller says, the court look only to the *thing itself*, which is the *subject* of the insurance, and that when the ship was insured, the wages and provisions were no part of the thing insured. Upon this principle of restricting an insurance to the article or object insured, it has also been decided, that sailors' wages and provisions, expended while a ship is refitting, cannot be recovered against the insurer of the ship. *Fletcher and others v. Poole*. Park 52, 53.

As to the second point: is the insurer of the *cargo* liable for such expenses?

There cannot be the slightest foundation for the position. Attempts it is true have been frequently made to extend the insurance of a ship to wages and provisions during an embargo; but nobody ever ventured to charge those expenses on the insurer of the cargo. As long as the terms of a contract and the intention of the parties shall have any weight in courts of justice, the idea will be reprobated. It is not easy to conceive an instance of grosser injustice than to make the insurer of specific property liable for *consequential* injury to *other* property, and more especially when the property insured has received no damage from any of the perils stated in the policy.

With respect to the third point. Can an action be supported against the insurer of the freight in the cause now before the court, for the expenses of provisions and sailors' wages during an embargo?

What is the nature of the insurance on freight in the present instance? It is an engagement that the insured shall receive 3000 dollars freight for the transportation of goods, wares, and merchandise on board the brig *Benjamin Franklin*. The ship has arrived safe, and the insurers have received

ed the sum stipulated. Under these circumstances it would be a violation of every sound principle of law and justice to maintain an action for the breach of a contract, which has been complied with literally and to the fullest extent.

To render an insurer liable, it is equally the dictate of law and common sense that the loss should happen to the *property* or *interest* specifically insured. But who I ask, will hazard the assertion, that the insured have sustained a loss on the freight insured, when they have received the *whole* sum insured agreeably to their contract with the insurers?

An insurance on freight to a *precise* amount, is a contract that the insured shall receive the sum mentioned for the conveyance of merchandise, without any loss or diminution arising from an embargo. When there is an insurance of this kind, and the embargo is the means of preventing *any part* of the cargo from being put on board, or in any other mode diminishes the freight, this will be a *direct* loss on the freight, arising from the embargo; and the insurer would of course be responsible for a partial loss on the freight.

There is no foundation for the position that the only peril from the embargo was to the freight. It would be more correct to say, the only peril to the freight arose from the peril to the ship and cargo; or any injury to them might create a loss on the freight. Even if it were true the freight *only* was in peril, yet the insurer thereon is not liable, unless it shall appear the embargo in some way produced a loss on the freight; in which case he would be liable only for *such* deficiency.

The reasoning of Justice Buller in *Robertson v. Ewer*, that the court look only to the thing insured and inquire if that be safe, applies with unanswerable force to prove that the insurer of the freight is not liable in this case any more than the insurer of the ship. If the insurer of the ship be not responsible for the expenses of an embargo because she arrives safe, unquestionably the insurer on the freight cannot be responsible for such expenses where the freight has been received, or in other words, is safe. In both cases the contract is equally complied with by the insurers.

It appears, therefore, upon the true construction of the policy, that neither the insurer of the ship, or of the cargo,

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But though not any one of the insurers be separately liable under an express contract for the expenses of an embargo, yet upon every principle of equity, and by operation of law, they are all bound to contribute their several proportions as gross or average loss, which is the

4th point. It is an acknowledged principle of distributive justice, that all persons who risk their property at sea, shall make compensation to any one of them who is obliged to sustain a certain loss for the common or general benefit. For this purpose it is understood they all enter into a *tacit* obligation; nothing of which is expressed in the policy. Natural justice however and the obligations of common honesty require it at their hands. In case their respective interests are insured, the insurers must make good the loss in such proportions as they have underwritten; and in *Dacosta v. Newnham*, 2 Term 407., it is admitted, and very properly, that *freight* as well as *ship* and *cargo* shall contribute to a general average.

But the question occurs, is the expense arising from an embargo to be brought into general average? Does the law throw these expenses as the result of unavoidable necessity on the insurer of ship, cargo and freight? *Park* in his treatise on insurance seems to be clearly of opinion they are general average; and that both Lord *Mansfield* and Justice *Buller* were of the same opinion. Be this as it may, we find an average loss described to be, where the expenses are *deliberately* and *unavoidably* incurred with a view to the general safety of ship and cargo. *Park* 128, 125.

What is an embargo? It is the detention of a ship by public authority for national purposes, and continued any length of time that the real or imaginary *interests* of the country may require. Let me ask then whether the master and crew could possibly avoid a situation of this kind, any more than they could avoid a fleet of pirates, or the overwhelming fury of a storm? In the latter case the loss is produced by the elements, in the former it is the effect of human violence; but in both it is equally inevitable. Whether the loss be occasioned by a physical or moral necessity, all who are bene-

fitted by it are bound in justice to contribute to the aid of the principal sufferer.

To make the loss gross average, it is said the expenses must be deliberately incurred. We shall not enter into a dispute about words. It is properly observed by Lord *Kenyon*, that the rule of consulting the crew is founded more in prudence than in necessity; and that the danger is often too great to admit of deliberation. 1 *East* 228. To which may be added, not only the danger is often too great to consult the crew, but the nature of the transaction may afford decisive evidence of the inutility and folly of doing it. In the case of an embargo the thing speaks for itself; and nothing would be more truly ridiculous than a formal consultation whether they should resist the whole power of a nation or country. The nature of the force applied in the case of an embargo admits of deliberation no more than the *danger* from a number of pirates with a bloody flag would admit of it. Where there is sufficient evidence that the loss was *unavoidably* incurred for the general benefit, the deliberation of the thing is a matter of no consequence.

The law to some purposes considers an embargo both as a peril and a loss, as much so as it does a storm attended with the most fatal effects; and it is for this reason the assured may abandon in the case of an embargo. When an embargo happens, it is the same thing as if a storm happens with damage, both as to the right of abandonment and the expense incurred in saving the ship and cargo.

In the case of a capture it is admitted, the charges of reclaiming the vessel, with the wages and expenses of the ship's company, shall be brought into general average. *Park* 124, 5.

The embargo like the capture is accompanied with superior force; and in both cases the expenses are equally necessary to preserve the ship and cargo. An embargo is an arrest, a capture for *special* purposes; and while it continues, may be called a capture during the pleasure of the government that causes it. The expenses requisite to save her from destruction, whether she be under the gripe of national force or individual rapacity, appear to be equally unavoidable, and must be borne by all who have an interest in the preservation of the property.

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The case of *Brinkley and others v. Presgrave*, 1 East 220, in point of principle is very much the same with that now before the court. It was an action by the owner of the ship against the owner of the cargo, to recover for an average loss on a quantity of wheat the property of the defendant, damaged in the harbour of *Sunderland* on board the ship *Argo*, owned by the plaintiffs. It appeared that the ship in entering the harbour was exposed to a storm, which made it necessary in order to save her, to cut and destroy the cables and other parts of the tackle, and to hire a number of workmen at an extravagant rate to work at the pumps. To recover an average loss of all these expenses, the action was brought and succeeded. In deciding the cause, the court observe that all those articles made use of by the master and crew upon the emergency and out of the usual course, and other expenses incurred, must be paid proportionably as general average. Upon the argument, the counsel for the defendant urged that the captain had not consulted the crew. But the court treated the idea with deserved neglect, it appearing that what he did was for the benefit and interest of all concerned.

In *Dacosta v. Newnham* the same principle is admitted and recognised, 2 Term 407., that where a ship is *obliged* to put into port for the benefit of the *whole concern*, the charges of loading and unloading the cargo and taking care of it are general average. Whether a ship be obliged to put into port for the benefit of those concerned, or whether she be obliged to stay in port for their benefit, the principle of necessity is the same. In one case indeed it is a physical necessity, in the other a moral necessity, but both are equally imperious.

Upon this point I shall only add, that the average loss is consonant to the very nature and essence of insurance, which is intended to divide the misfortunes of commerce among several, rather than throw them upon a single person. It seems repugnant to the feelings of justice and to the spirit of the contract, to render an insurer on freight exclusively liable to pay the expenses of the embargo, while others are equally benefitted by these expenses. The determination is oppressive, and injurious to commerce.

It may be remarked, that in giving my opinion I have uniformly stated the question in very particular terms, and

that I have considered it under all the peculiar circumstances attending the case. My reasons for this I shall now mention.

I approve the position advanced by Mr. *Moylan* on the former argument of this cause, that to render an insurer on freight liable for the expenses of an embargo, on any other ground than general average, a special contract, or some memorandum at the foot of the policy, is absolutely necessary. It should seem from the expressions of lord *Mansfield*, that an insurance on the *voyage* or on the *crew* is a special contract of this nature. In the case of *Robertson v. Ewer* he says, "on a policy on a *ship*, sailors' wages and provisions" are never allowed in settling the damages. The insurance "is on the *body of the ship*, not on the *voyage* or *crew*." An insurance on the *voyage* it should seem purports to be a contract that the voyage shall sustain no loss from any of the perils in the policy; in which case the voyage is made the direct object of the insurance, and will cover the expenses of the embargo, because the embargo occasions an injury and loss on the voyage. A policy that the insured shall sustain no loss on account of the crew from any of the usual perils, would no doubt be a *direct* insurance against the expense of sailors' wages and provisions arising from an embargo. A general insurance on the freight would also be such a contract as to subject the insurer exclusively to the expense of an embargo. Where the *freight* of a vessel is insured in *general* terms, it is an express engagement she shall earn her full freight without loss from an embargo; and will be equivalent to an insurance on the *voyage*, or the *profits* of the voyage. The insurer in these cases stands in the place of the owner, and when Judge *Buller* says, "the expenses of an embargo must fall upon the owner only, and the *freight* shall bear it," he means that where the owner had insured his ship and nothing more, himself as the owner, or the freight, which is the same thing, must bear the expense arising from an embargo.

There is an evident distinction between a general and indefinite insurance of freight, and insurance of a precise sum on the freight. If this had been an insurance of the whole freight, *co nomine*, it would cover all the expenses of the em-

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bargo. But insuring a fixed sum on the freight is the same thing as an insurance of a fixed sum on the cargo; and there is no just reason why the expenses of an embargo should be a partial loss on freight received, any more than they should be a partial loss on goods delivered.

I have given my opinion that this is a case of general average. If it be not, the plaintiff is totally without remedy. He can never be indemnified for the expenses of the embargo by virtue of any contract expressed in the policy. The underwriters on the ship, cargo and freight, have complied with their engagements, agreeably to the terms and meaning of their respective assumptions. The ship has returned in safety to her port, the cargo has been delivered without damage, and every farthing of the freight has been paid to the owner, which the underwriter stipulated he should receive.

I shall conclude with the remark, that I have felt much satisfaction on discovering that cases have occurred in *Westminster Hall*, since forming my opinion on this subject, in which the Chief Justice of *England* has added the weight of his judicial authority to the two leading points I have endeavoured to establish. In the case of *M^r Arthy and others v. Abel*, reported in 5 *East* 388., the defendant underwrote 200*l.* on the freight. The ship, also was insured by some other person. The vessel being detained by the *Russian* government, the assured abandoned both vessel and freight to the respective insurers. The embargo being taken off, the ship arrived at *Plymouth*, and earned freight to the amount of 2242*l.* 6*s.* 10*d.*, and notwithstanding these circumstances the assured sued the underwriter on the freight. The court gave judgment in favour of him, and in delivering the opinion, lord *Ellenborough* reasons in the following manner: "If the fact, says he, be merely looked at, freight, in the events which have happened, has not been lost, but has been fully and entirely earned and received by the plaintiffs, the assured; and if so, no loss can be properly demandable against the underwriter on the freight, who merely insures against the loss of that particular subject by the assured. But if the freight can be considered lost to the owner of the ship in any other sense or manner, it was not by means of the

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“perils insured against, but by means of the abandonment of the ship, which abandonment was the act of the assured themselves, with which and its consequences the underwriter on the freight has no concern.” “Therefore,” continues lord *Ellenborough*, “it appears to us, *quacunque via data*, that is, whether there has been no loss at all on the freight, or being such, it has been a loss occasioned entirely by the act of the plaintiffs themselves, they are not entitled to recover,” and they were accordingly nonsuited. I cite this case to prove the present action cannot be maintained.

The case of *Sharp v. Gladstone*, in 7 *East* 33, 34., shews that in the opinion of lord *Ellenborough* the expenses of an embargo are a ground of general average.

For these reasons I think the judgment of the Supreme Court is erroneous, and should be reversed.

YOUNG, President. Having the misfortune to dissent from the judgment of my respectable colleagues, it may be proper to state the grounds of my opinion. My remote situation and general course of study do not well qualify me for deciding in cases of this kind. But as the parties have a right to my opinion, it is my duty to give that which I believe to be most consonant with law and justice.

In the expounding of contracts, the meaning and intention of the parties is to be ascertained according to the subject matter. In mercantile transactions of a general nature, founded on the common usage of civilized countries, a regard ought to be had to the substance and spirit of the contract; and I consider it to be a sound rule, that where one of the parties has received an adequate consideration for his engagement which is somewhat dubious in its terms, it ought to be liberally construed, and not in such a manner as tends to disappoint the just and reasonable expectation of the party in whose behalf the promise was made.

In the first place, it may be observed that so far as respects mercantile usage, upon which the plaintiffs in error attempted to support an exoneration from the claim of the insured, it was negatived by the jury. If such a usage had been established in *Pennsylvania*, it is natural to suppose particular instances of it might have been shewn. In that case there would have been no question on principles or the practice

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of other states. The usage in this would have been considered as known by both parties, and to have formed a part of their contract. If the negating of the usage after an endeavour to support it by testimony be not evidence of the contrary, I consider the verdict as entitled to weight, unless it can be shewn by some adjudications that the jury have been mistaken.

The counsel for the company have in the first place relied upon an observation of Mr. Park in his compilation, that it was a general opinion, that the extraordinary wages and victuals expended during the detention of a vessel by a foreign prince not at war, *ought* to be brought into general average. He adds that this matter, alluding to the period of his writing, had never been expressly determined. A court of law however cannot be too cautious in adopting opinions which must be more or less general, according to the views and interests of particular persons. We ought to see whether they are supported by just principles, have been sanctioned in practice, or established by legal authority. *Opinionum commenta delet dies, nativæ judicia confirmat.*

The argument relied on for the company is that the insured having upon the determination of the voyage received their *full* freight, the insurers have satisfied the terms of their contract. The position however proves too much. In that point of view the loss which the insured have sustained from the detention of their ship would not be general average, for the company would be excepted from contribution, upon the plea that it had satisfied the terms of its engagement, while in reality it satisfied nothing. Supposing the detention to have been so long as to have swallowed the whole freight, the insurers of it on this ground would still escape contribution. If the owner of the ship, the several shippers of the cargo or their respective insurers, were called upon to indemnify the loss of freight, might not they with equal reason say, "We have satisfied the terms of our contract. The ship and goods have arrived at the port of discharge, and we are bound only for the ordinary expenses of the voyage. By not abandoning when those concerned might have done it, our contract was not intended to cover those extra expenses." The very detention might have occasioned a

rise in the market of the goods shipped, instead of occasioning a loss to the freighters. The interests of the owners of ship, goods and freight, are frequently altogether distinct and separate. It is otherwise when there is a common end, a joint profit and advantage; as in the case of a copartnership, where the maxim applies, *qui sentit commodum, sentire debet et onus*. It has the appearance of a quibble to tell the owner of freight, perhaps the charterer for a particular voyage, who has been necessarily put to expenses for the purpose of securing it, "You have lost nothing. It is true indeed you "paid us for insuring that your freight should neither be entirely lost or materially diminished. But we meant only to "secure the solvency of the shippers of the cargo, and they "have paid you." I am unable to discover this to have been the intention of the parties. The lien upon the goods is generally ample security. If worth the freight, the owners or their insurers must pay it. The question here is, have the insured sustained a loss under one of the risks assured against? There is no doubt but that an embargo is one of those risks. It may defeat the main end of a voyage, and occasion a very great loss. But it is contended that the owners in this case did not sustain the loss as owners of the freight. But it is clear to my mind that their primary object was freight. The ship was in fact what is termed a seeking ship, and was only the medium for acquiring freight. The mariners were only subservient to this main object. The freight became thus the true fund for defraying not only the ordinary charges which fall under the head of ship and furniture, but of those extraordinary expenses which are the result of an embargo. It would seem therefore natural and reasonable for this fund to bear them, and consequently the insurers of it. It has been intimated that these expenses occasioned only a partial loss, and there is no instance of a recovery for such a loss. On the principle that the whole includes every part, it will not be easy to distinguish between a total and a partial loss. It has not been contended that the exertions and the expenses incurred by the insured were not for the benefit of the insurers, the present plaintiffs in error. The ship herself and the goods aboard were apparently safe. The owners of both found it more convenient to wait than abandon, if they had insured,

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which does not appear from the case before us. If there was in fact no insurance of ship and cargo, those expenses were exclusively for the benefit of the freight, unless it can be clearly shewn they form a subject for general average, and that the several and distinct owners of ship, cargo and freight, are all responsible *pro rata*. This might often occasion a great uncertainty and confusion; and unless I can see sound principle or settled law for extending general average so far, I must consider it special, and applicable to the freight. In *England* the point appears to have been long ago so determined at *nisi prius*, and acquiesced in there and by the neighbouring commercial state of *New York*. It appears recognised in several cases under the *Russian* embargo, which by a species of courtesy obtained that name, although an act of hostility on its commencement.

M'Arthy et al. v. Abel, 5 East 388., was the case of an abandonment of both ship and freight by the owners, who had chartered their vessel for a particular voyage, to certain persons. There it was held, under the particular circumstances stated in the report, that the assured could not recover as for a total loss of the freight, the freight having been in part earned: or, as the margin reads, supposing the freight to have been in any other sense lost to the assured by the abandonment of the ship to the insurers thereon, it was so lost not by any peril insured against, but by the voluntary abandonment. It appears from the case that one of the owners, the insured, received 500*l.* from the freighters to pay the seamen's wages, &c., and that the freight was considered the fund for those wages, to which they were entitled though confined and rendered unable to earn them. The assured could not therefore recover as for a total loss, and as to a partial loss there was an abandonment of both ship and freight. It must be acknowledged however, there is some obscurity in the expressions attributed to lord *Ellenborough*. If the reporter be accurate, it can only be said "*aliquando bonus dormitat.*" It would seem as if that able judge had considered the abandonment, with the actual receipt of part of the freight, as acts inconsistent with each other, and the plaintiffs concluded by their own conduct. But this is explained by the subsequent case of *Sharp v. Gladstone*, 7 East 24. There the several under-

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writers who had separately paid as for a total loss of ship and freight, were held as coming into the place of the assured. It was in fact an adjustment of loss of ship and freight, and the object was to apportion the losses among the several underwriters, according to the subjects insured. Each set of underwriters were to be entitled to their respective salvage, subject to the deductions applicable to each. Certain items were entirely struck out, others to be apportioned according to the respective interests of the two sets of underwriters; and on this subject he lays it down, that the very charges of putting the cargo on board was for the benefit of the underwriters on the freight. This carries an extension of special average arising from embargo farther than mere seamen's wages and ordinary disbursements; so far is lord *Ellenborough* from calling in question the authority of the several cases, then cited to shew that the expenses of an embargo belonged to the underwriters on freight. Judge *Livingston*, now of the Supreme Court of the *United States*, acknowledged to be well versed in the knowledge of commercial law, appears to have entertained the same opinion, as well as the learned bench of the Supreme Court of *New York*, and that of our own. I would therefore be for affirming the judgment.

Judgment reversed.

Supreme Court of Pennsylvania.

NISI PRIUS.

1809.

WILCOCKS and others against The UNION INSURANCE COMPANY.

Monday,
February 27.

Any trick, cheat, or fraud, and any crime or wilful breach of law, committed by the master to the prejudice of his owners, is barratry.

If the policy contains a warranty of neutral property, and at the same time, the usual agreement by the underwriter to answer for the barratry of the master and mariners, the warranty implies, that the neutral character shall not be forfeited by any acts of the insured or their agents, except only by such as may amount to barratry.

The crew of a neutral vessel, captured and sent in for adjudication, are not obliged to navigate her. It is the duty of the captors to put a sufficient force of their own on board, and if they neglect to do it, they do

not take sufficient possession, and the neutrals may consider her as abandoned to them. But if an insufficient force is put on board in consequence of a promise by the neutral crew to navigate her to the destined port, they are bound by their promise, and must be considered for the purpose agreed on, as the hands of the captors. If in violation of their promise, they take the vessel into their own hands, it is an unlawful rescue, which is an act of barratry.

THIS was an action of covenant upon a policy for 20,000 dollars on goods in the brig *Pennsylvania*, on a voyage from *Philadelphia* to *Smyrna*, and from thence to *Canton* and home, with liberty after leaving *Smyrna* to touch and trade at *Trieste*, or one other port in the *Adriatic*. Warranted *American* property, proof whereof if required, to be made in *Pennsylvania* only.

The declaration contained two counts; 1. for a loss by capture; 2. for a loss by barratry; and the cause was now tried before the Chief Justice and a special jury, *C. F. Ingersoll* and *Hopkinson* being of counsel with the plaintiffs, and *Dallas* and *Rawle* with the defendants.

The controversy involved a great mass of testimony, and several points of law of considerable novelty and importance; but it is unnecessary to give an outline in this place either of the evidence or the law, as both are condensed with great precision in the following charge.

TILGHMAN C. J. This action is for the recovery of 20,000 dollars, underwritten by the defendants upon goods in the brig *Pennsylvania*, on a voyage from *Philadelphia* to *Smyrna*, &c.; warranted *American* property, proof whereof, if required, to be made in *Pennsylvania* only.

The plaintiffs' declaration contains two counts. In the *first* they declare on a loss by capture; in the *second* on a loss by the barratry of the captain and mariners.

The brig sailed on her voyage from *Philadelphia* to *Smyrna*, where she arrived safe, and proceeded from thence to *Trieste*, where she took in a cargo consisting principally of quicksilver.

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The adventure of the master, captain *Macpherson*, amounted to sixteen or seventeen hundred dollars. The cargo was wholly the property of the plaintiffs, native citizens of *Pennsylvania*. The brig, manned by fourteen hands, including the captain, sailed from *Trieste* on the 4th of *May* 1807, bound to *Canton*, and was proceeding on her voyage, when on the 13th *May*, not far from the strait of *Messina*, she was stopt by two privateers, a polacre and a xebec under *English* colours, who, after examining her papers, put two men and a boy on board of her, and ordered her for *Malta* for further examination. The name of one of these men was *Hardy*, a *British* subject, who was prizemaster; the other man was a *Maltese*. The brig then proceeded, until she doubled Cape *Passaro* in a course proper either for *Malta* or *Canton*. After doubling the cape, she altered her course, and steered down the *Mediterranean* for *Canton*. On the 16th of *May* another privateer under *English* colours, the *Grande Bretagne*, took possession of the *Pennsylvania*, and carried her into *Malta*. She was there libelled in the *British* court of vice-admiralty, and condemned on the 13th of *July*. The reason assigned by the judge for condemnation was, that she had been "rescued" by the captain and crew, from the hands or possession of the "first captors."

Thus far the facts are undisputed, and the defendants say, that they ought not to make good the loss, because it was occasioned solely by the improper conduct of the captain and crew, and that this conduct, though improper, did not amount to barratry. On the other hand the plaintiffs allege, that in fact there was no rescue, although the court of admiralty have decreed so; and that if there was a rescue, it was barratry, against which the defendants have insured.

The cause is thus divided into two points, the *first* of fact, the *second* of law. The jury will turn their attention first to the fact, and if they are of opinion that there was no rescue, their verdict on the *first* count, will be for the plaintiffs; but if they think there was a rescue, then for the defendants. On the *second* count, I will give them my opinion on the law respecting barratry.

I shall not enter into a minute detail of the evidence. But it will be proper to take notice of some leading facts, and to

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make some remarks, with a view to assist the jury in their inquiry.

The plaintiffs' principal witnesses are captain *Macpherson* and *Vanvoores* the first mate. They agree very much in their testimony, the substance of which is to the following effect: that after the privateer had put *Hardy*, the *Maltese* and the boy, on board the *Pennsylvania*, the crew refused to work for the privateer. Captain *Macpherson* being informed of this, advised *Hardy* to hail one of the privateers, who was near, and ask for more hands. *Hardy* hailed repeatedly, but the privateer refused to send any more and went off. In this situation the *Pennsylvania* pursued her course, which answered either for *Malta* or *Canton*. Off the coast of *Sicily*, captain *Macpherson* proposed to *Hardy* to go into *Syracuse* where he might get hands to navigate the brig to *Malta*, or have her papers examined by the *British* consul or agent. *Hardy* at first declined this, but at length consented. They passed *Syracuse* while it was *Hardy's* watch, the captain being asleep below, and *Hardy* deceived the persons on deck, by telling them *Syracuse* was ahead. When the captain awoke and came on deck, he perceived the trick, and shewed some resentment. Not long after this, as they approached the dividing point, between the course for *Malta* and *Canton*, the crew declared that they would not work the brig to *Malta*, and *Hardy* knowing that he had no hands of his own sufficient to work her, determined voluntarily to deliver up the papers and the possession of the vessel to captain *Macpherson*; but it was agreed between them, that there should be some appearance of threats or force, in order to deceive the *Maltese*, who *Hardy* feared would do him some injury, if he saw that the brig was voluntarily surrendered. Accordingly some words passed, which had the appearance of threats; but in truth a voluntary surrender was made.

A different story is told by *Stockton* and Dr. *Kennedy*, the principal witnesses of the defendants. They say that while *Hardy* was hailing the privateer for more hands, the carpenter advised the crew to consent to navigate the brig, lest they should be removed on board the privateer, and thrown into prison in the first port they arrived at. That the crew approved of this advice, and consented to work the vessel to

Malta; whereupon *Hardy* told the privateer there was no occasion to send more hands. *Kennedy* represents the delivery of the papers by *Hardy* to captain *Macpherson*, to have been in consequence of a threat by the latter to take them by force, if they were not delivered to him. *Stockton* declares that captain *Macpherson*, when they came near the dividing point, mustered the crew, and asked them whether they were willing to work the brig for him, and being answered that they were, he ordered the man at the helm to keep her west, in consequence of which the course was immediately altered, and they stood down the *Mediterranean*.

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I believe it will be a vain attempt, to try to reconcile all the testimony in this cause. There has been *perjury* on one side or other, and the jury must decide between them. They are the sole judges of the *character* of the witnesses. No direct evidence has been offered to impeach the character of any; but it has been remarked by counsel, that a strong imputation against the character of some of them, arises from a comparison between the evidence delivered at *Malta*, and in this court. The jury will make that comparison; and if it appears that *any* witness has deviated *now*, from what he swore at any other time, it will undoubtedly lessen his credibility. They will also consider the situation in which the several witnesses stand. If any of them appear to have either character or property at stake in this cause, they will not stand so fair as those who are perfectly indifferent. I cannot help remarking that it requires strong testimony to convince us, that a prizemaster with a very rich vessel under his care, should make a voluntary surrender of her when within a day's sail of his port. Such conduct is not easily accounted for, unless by supposing that the privateersman, knowing there was no legal ground for condemning the vessel, had intended from the beginning, to condemn her by fraud and perjury, and in pursuance of this plan *Hardy* gave her up, with a view of procuring a recapture by the first cruiser he should meet with, and then swearing to a rescue. If the proof of rescue, depended solely on the testimony of the privateersman, there might be good ground for supposing there was such a plan as I have mentioned; but what are we to say to the testimony of *Stockton* and Dr. *Kennedy*? The jury must weigh the whole evidence, and decide on it.

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In speaking to this part of the cause, the *plaintiffs'* counsel raised some points of law, concerning which, they requested my opinion to the jury. What is the duty of the crew of a neutral vessel, captured and sent in for adjudication? And what kind of force does in law constitute a rescue?

As to the duty of the crew, they are *not obliged* to navigate the vessel; the captors therefore should take care to put sufficient force of their own on board. Should they send but a single hand, or so few, that it was manifestly impossible to work her, this would not be taking sufficient possession. In that case the neutrals are not obliged to submit their property and lives to the mercy of the winds and waves, and may lawfully consider her as abandoned to them, and act accordingly. But if a force insufficient to work the vessel is put on board by the captors, in consequence of the promise of the neutral crew, to navigate her to the destined port, they are bound by such promise, and must be considered, for the purpose agreed on, as the hands of the captors. If, in violation of their promise, they take the vessel into their own hands, I am of opinion that it is an unlawful rescue. As to the degree or kind of force, necessary to make a rescue, it is obvious that force is of two kinds, either actual or constructive. If captain *Macpherson* assumed the command of the crew, and without the consent of *Hardy*, ordered the helmsman to alter his course, and such order was obeyed, this was *actual force*. But there may be constructive force by *threats*; the threats however must be of such a nature, as might reasonably be supposed sufficient to intimidate a man of moderate firmness. It would require no very great threatening, to give cause of reasonable alarm to two or three resolute men, surrounded by fourteen, in the midst of the ocean.

Having said enough as to the facts in this case, I will now proceed to the second point, the law of barratry. But I must first say a few words concerning a point which I suggested to the consideration of the counsel, during the argument, in order to afford them an opportunity of satisfying a doubt of my own, and because consequences are involved in it, which may tend to shorten trials of this kind. The underwriters have expressly insured against barratry. The insured has warranted that the property is neutral, and by construction

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of law, that it shall be so conducted, as to *remain* neutral, during the voyage. Here is a conflict between the covenant of the insurers, and the warranty of the assured. What is the effect of it? The decree of the foreign court of admiralty is *conclusive*, except as to those matters, concerning which the insured has made a *warranty*, and has reserved to himself the right of proving his warranty in this court. It follows, that if he has *not* warranted against *barratry*, and the foreign sentence adjudges that *barratry* has been committed, no evidence except by consent could have been given in this cause, to contradict the decree of the court of *Malta*. I will now consider the effect of the collision between the covenant to insure against *barratry*, and the warranty of *American* property. This warranty, in strict construction, would only import, that the property belonged to a neutral person. But it has been extended much further. It is understood that the vessel should be furnished with all those documents, which are the proof of neutrality, and that no act should be done on the part of the insured to forfeit the neutral character. To carry this idea to its full extent, it would include the acts of the captain, who is the agent of the insured. But considering the express insurance against *barratry*, I think it, taking the whole instrument together, most reasonable so to construe it, as to leave the insurance against *barratry* in full force; especially as the same construction has been put on another warranty in the policy, *viz.* that the insurers shall be free from loss in consequence of seizure on account of illicit trade. It is understood, that if a loss arises in consequence of illicit trade of the *captain*, amounting to *barratry*, the insurers are liable. On this principle, the warranty will imply, that as to all acts to be done by the insured themselves, or by their agents, except only such as amount to *barratry*, the neutral character shall be preserved.

I will now consider what is *barratry*. As it is an act committed by the master, or mariners, over whom the insurers have no control, it has often been wondered, and it is indeed cause of wonder, that it should still keep its place in policies of insurance. Many questions have arisen on it, and many cases have been cited on the argument of this cause. I have examined all the *English* cases, (as well as the short intervals

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between the sittings of the court would permit) from *Knight v. Cambridge*, in the 9th of Geo. II, to *Earl &c. v. Rowcroft* in the 47th George III, and the cases in our own country from *Hood's executors v. Nesbitt*, in our supreme court in the year 1792, to *Doederer v. The Delaware Insurance Company*, in the Circuit Court of the *United States*, April 1807. I will give what appears to be the result of these cases, without undertaking to give a definition of barratry; for such is the imperfection of language, that many disputes arise from the general expressions employed in *definitions*. The result then of the cases appears to me to establish two principles. 1st, That any trick, cheat, or fraud, practised by the captain, to the prejudice of his owners, is barratry. 2d, That any *crime* committed by the master, to the prejudice of his owners, is barratry. In those cases, where the point turns on *the fraud*, or *cheating* of the captain, it is always important to ascertain whether his conduct promoted his own interest; for if it did in any considerable degree, and especially if his interest was in exclusion of his owners, the presumption is violent that his intent was fraudulent. The hasty perusal of these cases, has sometimes induced an opinion, that there could be no barratry where the captain did not act from motives of *self-interest*. But this test will not be sufficient to decide those cases which arise on the second branch of barratry, from *crime*. What is crime? As applied to the present purpose I will call it "a wilful breach of law, to the prejudice of the "owners." Now in this point of view, it is of no consequence, whether the captain has an interest of his own or not. It must be considered as an implied trust between him and his owners, that he will not without their orders, break a law, which subjects their property to forfeiture. It is understood to have been decided, that leaving a port without paying duties, and thereby rendering the ship liable to confiscation, is barratry. It has been decided, that it was barratry for the captain, to make a cruise in which he took a prize, without a lawful letter of marque, although he libelled the prize in the name of his owners, as well as his own; so if he carries on a trade forbidden by law, although his intention was to make a profit for his owners.

I understood one of the defendants' counsel, (Mr. Dallas)

to admit that a violation of the law of this state would be barratry. In this respect I do not see any material difference between a law of our own state, and a law of nations. We consider the law of nations as part of our law. It was so determined in the case of *De Longchamps*, 1 Dall. 111., who was indicted, convicted, and punished, for a breach of the law of nations, committed in the house of the *French* ambassador, in this city. We have the opinion of Judge *Buller*, that the act of a neutral master, which forfeits his neutrality, is barratry. It has not, I think, been contended by the defendants' counsel, that a *rescue* is not unlawful. On that point I agree with the opinion of Judge *Washington*, in *Doederer v. The Delaware Insurance Company*, where he thus expresses himself; "that the attempt to rescue the vessel, was unlawful, and "afforded a ground for condemnation, is proved by the opinion of the best informed jurists, and has received the sanction of the common law courts, in a variety of instances;" he adds "that this doctrine was admitted by the counsel of "the assured." Upon the whole, my opinion is (formed indeed during the course of this trial, and therefore not so much to be relied on, as if after an argument in bank) that if a rescue was committed, it was an act of barratry.

If therefore the jury should find for the defendants on the first count, my advice to them is to find for the plaintiffs on the second count. On the contrary, if they find for the plaintiffs on the first count, then, there having been no rescue, there was no barratry, and in that case the verdict on the second count must be for the defendants.

The jury found for the plaintiffs on the first count, and the defendants acquiesced in the verdict.

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Common Pleas of Philadelphia.

1809.

Wednesday,
June 7.

The discovery of material evidence after the trial, which by using due diligence the party might have discovered before, is no ground for a new trial.

KNOX *against* WORK and others.

THIS was an action of trespass for breaking and entering the plaintiff's house, and committing an assault and battery upon him.

Upon the trial at an adjourned court in *January* last, the jury found a verdict against *Work* and *Link*, two of the defendants, 100 dollars damages, and not guilty as to the others.

Sergeant and *Hopkinson* on the next day obtained a rule to shew cause why there should not be a new trial, upon several grounds; and among others, upon the ground of material evidence discovered subsequent to the verdict. On this part of the case, they produced the affidavits of two persons, that the plaintiff had told them he had no resentment against *Work*, and had sustained no damages by him, or any of the defendants; that he was desirous they should mention it to *Work*, and have the matter made up, and that he would pay his own costs, if *Work* would pay his. The defendants likewise swore that they were ignorant of the matters set forth in the affidavit, until after the verdict was given in, otherwise they would have procured the attendance of the witnesses.

Brown and *Milnor* opposed the new trial; and the opinion of the court upon this point, was as follows:

RUSH, President. Before we go into this question, we shall refer to an opinion given by the president of this court at *Easton* 1792. (His Honour here read the note of *Aubel v. Ealer* (a).

(a) **AUBEL**
v.
EALER. } IN this case all matters in variance between the parties were referred under a rule of court, and at *December* term 1791 the referees reported in favour of the plaintiff 40*l.* 19*s.* 6*d.* The defendant excepted to the confirmation of the report, upon the ground that since it was made, he had found a receipt in full from the plaintiff for 1157 dollars, dated 18th *February* 1780, which had been mislaid, and

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We believe it to be impossible to find an instance of a new trial granted in a court of *law*, to let in evidence discovered after the trial, except in the case of the coachmaker's bill, in

could not be produced at the hearing before the referees. The exception was accompanied by an affidavit of its truth, and that the receipt was material to the exceptant's defence in the cause; but it appeared that the receipt had been constantly in the defendant's possession, though mislaid.

The referees stated to the court that the receipt was not produced before them, but that mutual accounts before the date of the receipt were produced, and that the defendant did not request further time in order to produce the receipt or any other testimony.

The exception was argued at *December* term upon a motion to set aside the report.

RUSH, *President*, delivered judgment. It seems to be agreed that the same causes which will set aside a verdict, and induce the court to grant a new trial, will also be sufficient to induce them to set aside a report. 1 *Dal.* 314, 15. Upon this ground we shall take up the present question.

Among the many reasons assigned in our law books for granting new trials, by far the most usual grounds in fact and practice, are the mistakes of the judge or jury who tried the cause. With good reason the mistakes of the attorney, counsel, or party, have been considered in a more rigid point of view. Hence the general rule most certainly is, that mistakes originating with them cannot be relieved by a new trial, nor will a new trial be granted on account of evidence being discovered after the trial, which by using due diligence, might have been discovered before the trial. 5 *Bacon* 250. An action of *crim. con.* was brought, and verdict for 1000*l.* After the trial it was discovered the woman was not the *wife* of the plaintiff. The court nevertheless refused a new trial and laid down the above rule, and this so late as the reign of *George II.*

There shall be no new trial where the party might have had the evidence on the first trial. *Stra.* 691. The same doctrine is again laid down in a case still more recent. *Cooke v. Berry*, 1 *Wilson* 98. An action was brought upon a promissory note, to which the defendant pleaded that plaintiff accepted of some chests of tea in satisfaction, upon which issue was taken, and verdict for the defendant. Motion for a new trial, on affidavit that the plaintiff took the plea to be a sham plea, and had a letter from under the defendant's hand, in which he acknowledged he had disposed of the tea, and engaged to pay the plaintiff the money due on his note; which letter the plaintiff did not produce at the trial, thinking the plea a sham plea, and that defendant could not prove it. By the court, "New trials are never granted, where it appears the party might have produced and given material evidence at the trial, if it had not been his own fault; because it would tend to introduce *perjury*, and there never would be an end of causes, if once a door was open to this. The plaintiff had notice of the defence of the defendant in his plea, which makes this a strong case, and ought to have come prepared to falsify it, at the trial."

In the foregoing case we see the same reason assigned, viz. the danger

APPENDIX. *Broadhead v. Marshall*, 2 *W. Black.* 955., the circumstances of which were very particular. The defendant was an *executor*; in the next place he was in the *West Indies* at the trial;

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of perjury, as in the case where new trials have been refused, when the testimony kept back, has been that of living witnesses. If a plaintiff or defendant may come forward and swear that he had mislaid a piece of evidence, and that he could not find it at the trial, and in such case be considered as entitled to a new trial, it will be opening a wide door to perjuries indeed. Should this be once established as the law of the land, nothing more will be necessary for any artful man, than by designedly keeping back a part of his evidence, and swearing that he could not find it, to secure a second trial on every occasion.

The case in 2 *Blackstone's Rep.* 955., when duly attended to, evidently corroborates the opinion of the court. There, it is true, a new trial was granted, where a receipt was discovered *after the trial*. But the case is a singular one—the party to whom the receipt was given, was dead—the executor was out of the country, at the trial, and the papers and books of the testator lodged in the hands of a *third* person who was disinterested, *viz.* the attorney, who swore he did not know there was such a receipt, or that it was in his possession at the time. Had it not been for these circumstances, the general rule it is evident, from the expressions of the reporter, would not have been departed from. His words are “on the special circumstances of this case, a new trial was granted.” In the case before us, the receipt appears to have been *always in the possession of the defendant himself*, who certainly must have known of the existence of it, and ought to have applied for further time to search for it.

We are fully sensible of the case in 2 *P. Wms.* 426, *Countess of Gainsborough v. Gifford*, where the master of the rolls says, I do agree we ought to be very tender how we help any defendant after a *trial at law*, in a matter where the defendant had an opportunity to defend himself. But such cases do exist; as if the plaintiff at law recovers a debt, and the defendant afterwards finds a receipt under the plaintiff's own hand for the money. The defendant *seems entitled* in such case, to the aid of equity.

This opinion we observe, admits that a new trial would not be granted at law, in the case specified. And we may observe still further, it is not an adjudged case, but a mere opinion of the master of the rolls, and that too expressed in the language of doubt. The defendant *seems entitled*. No adjudged case of the kind can be found.—See *Prec. in Chan.* 221, where the chancellor refused to relieve one against whom there was a verdict in trover, because he had an opportunity of defending himself. We certainly do not sit here as a court of chancery, nor do we conceive we are warranted in assuming the powers of such a court, or going further than other judges have gone before us. 1 *Dall.* 142. We are called upon to decide a point of law, as a court of law; and on such direct appeal it would not become us, to go the lengths, or to exercise the discretion which juries frequently do in *Pennsylvania*.

Whatever doubts may possibly be entertained on this subject, yet upon

in the third place, the paper was not in the hands of the *party*, but of the attorney. When a case of the same kind occurs, we shall have no objection to a new trial.

It is laid down as a general principle in various books, and is said to be an established rule, not to grant a new trial on account of evidence discovered *after* the trial, which by using due diligence might have been discovered *before*, or which it was in his *power* to have been furnished with. It would be of most dangerous consequence, to suffer one party, after he has heard the evidence of the other, to give new evidence. 6 *Bac. Abr.* 672. Upon this principle a new trial has been refused, where an *interested* witness had been examined, and not discovered till after the trial. *Turner v. Pearte*, 1 *Term* 717.

In the court of chancery in *England*, where the trial directed at law, is to satisfy the chancellor's conscience, it is certain the rule is different. In *Richards v. Symes*, 2 *Atk.* 319., lord *Hardwicke* says, there is a difference between issues at common law, and issues directed out of chancery, to inform the conscience of that court, which is not tied down to the same strictness and regard for verdicts as courts of common law; that he is aware of the inconvenience which might arise from granting new trials upon the discovery of new evidence relating to the same fact, and that courts of common law might set aside a verdict nine times out of ten, if it should be a ground for a new trial, that one of the parties was not

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the whole we take the law to be as we have stated, and we have taken due pains to investigate the point.

At all events the decision of the cause this way, will tend to excite vigilance and attention, to prevent fraud and perjury, and to put an end to litigation, objects of immense value in the administration of justice.

It is infinitely better that a single person should suffer a mischief, than that *every man* should have it in his power, by keeping back a part of his evidence, and then swearing it was mislaid, to destroy verdicts and introduce new trials at their pleasure. The idea is pregnant with alarming consequences; and would be a severe blow at the trial by jury. For if the defendant is entitled on this affidavit, to a second trial or reference, I see no reason why he might not, on a similar affidavit, have a third or fourth trial or reference, and the plaintiff an equal number also.

For these reasons, the court are unanimously of opinion, the report ought not to be set aside, and do therefore confirm it.

Report confirmed.

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apprised of the evidence on the other side. He concludes with declaring there are no grounds for a new trial in that case, and that it would be of dangerous consequence to grant it merely upon a suggestion, that the party was not apprised of the evidence, and therefore not prepared to answer it.

In *Stace v. Mabbot*, 2 *Ves.* 552., lord *Hardwicke* makes the same distinction between the two courts, and expresses himself as follows. "I cannot say that my conscience is satisfied "as to the grounds and truth of the evidence on which this "verdict is given. I proceed therefore upon the principles "of *this* court in directing trials, and not to break in upon "the rules *which are wisely laid down by courts of common "law*, as to granting new trials." From expressions like these, it seems, as if lord *Hardwicke* felt himself officially bound, to adopt a rule of decision in one court, which his sound and penetrating understanding taught him to believe, was differently and more correctly practised in another court.

The last case to which we shall refer is that of *Marriot v. Hampton*, 7 *Term Rep.* 269. The plaintiff having paid money for goods sold by the defendant to him, and lost the receipt, was sued and obliged to pay the money over again. After this he found the receipt, and brought an action to recover the money back. On the trial he was nonsuited by lord *Kenyon*, and the nonsuit was approved by the court of King's Bench, who refused even to give a rule to shew cause. It often happens, says the chief justice, that new trials are applied for on the ground of evidence supposed to be discovered *after* the trial, *and they are as often refused*; but this case he says goes much further. The court in their observations on this case take for granted, that the discovery of the receipt, would *not* be a ground for a new trial, much less to recover the money back again.

This opinion in the King's Bench in 1797 is in point, and fully supports the prior decision at *Easton* in 1792, by the president of this court, in the case of *Aubel v. Ealer* before mentioned. It is the opinion of *this* court therefore that the rule to shew cause why there should not be a new trial should be discharged.

Rule discharged.

Common Pleas of Philadelphia.

1809.

GUIER *against* M'FADEN.Saturday,
July 15.

THIS was an action of assumpsit, which was referred by rule of court under the act of 1705, to three persons, who found for the plaintiff "fifteen dollars and *the costs*." The rule contained no provision as to the costs; and the sum awarded not being sufficient to carry them in this court,

Referees under the act of 1705 cannot award costs of suit in the common pleas, upon a sum, which by the laws giving jurisdiction to justices of the peace, will not carry costs, unless there is an agreement in the rule that they shall have power over the costs, or the plaintiff had made an affidavit before the suit, that he believed the debt was beyond the sum within a magistrate's jurisdiction.

T. Ross for the defendant moved that the entry of judgment for the plaintiff should be made without costs. He argued upon the several acts of assembly, giving jurisdiction to justices of the peace, that if a party recovered in this court a verdict or judgment for an amount, and in a plea, of which a justice had jurisdiction, he could not have costs; and he said that an award under a rule of reference, was by the act of 1705 upon the same footing with a verdict. It required a particular stipulation as to costs in the rule, to entitle the referees to give them in such a case.

Shoemaker for the plaintiff contended that the costs of suit, unless by an agreement in the rule they were made to abide the event of the suit, were always within the power of the referees; for which he cited *Kyd on Awards* 134, and *M'Laughlin v. Scott* (a). An award he admitted was by the act of 1705 to have the same effect as a verdict; but it by no means followed that the powers of referees were to be limited in the same manner as those of a jury, in the matter of costs.

RUSH, President. It is agreed that the reference is in the common terms, and in the usual form; and that the referees have no express power given to them over the costs.

In the enumeration of awards, 1 *Dall.* 314., *Williams v. Craig*, it is correctly stated by the court, that in *Pennsylvania* there exists a species of awards or reports, unknown to the *English* law, founded upon an act of our legislature in the

(a) 1 *Binn.* 61.

APPENDIX. year 1705, by which it is enacted that, "where the plaintiff
GUIER "and defendant consent to a rule of court, for referring the
v. "adjustment of their accounts, to certain persons mutually
McFADEN. "chosen by them in open court, the award or report of such
 "referees, being made according to the submission of the
 "parties, and approved by the court, and entered upon the
 "record or roll, shall have the same effect, and be as available in law, as a verdict by twelve men."

This act expressly puts a verdict and a report on the same footing, when the latter is approved by the court; which is understood to be the case here, and that the only point in controversy, is the costs.

It very often happens that the legislature make costs operate by way of penalty, and sometimes they make use of them as a hedge, to keep the party going to law, within the limits of the tribunal pointed out to him. In our legislative acts we have several instances of this latter kind. To prevent harassing a person in a higher court, and thereby loading him with heavier costs, when the debt is cognisable in an inferior tribunal, it is enacted by the law of 1745, that if any person shall commence, sue, or prosecute any suit for any debt or demand made cognisable as aforesaid, in any *other* manner than is directed by *this* act, and shall obtain a verdict or judgment therein, for debt or damages, which without costs, shall not amount to more than 5*l*. (not having caused an oath or affirmation to be made before the obtaining of the writ of summons or capias, and filed the same in the prothonotary's office respectively "that he, she or they so making oath or affirmation did truly believe the debt due, or "damage sustained, exceeded the sum of five pounds,") he, she, or they, so prosecuting, shall *not* recover any costs in such suit, any law, &c. to the contrary notwithstanding.

In the 20*l*. act of 1794 is the following clause, "if any person shall bring any suit or action in *other* manner than is "provided by the act to which this is a supplement, and shall "not recover more than 20*l*. in such suit or action, he, she, "or they, shall not have judgment for any costs therein expended, except as in and by the said act is provided;" that is, unless he makes a previous affidavit, &c.

In the year 1804 the 100 dollar act was passed, the 14th

section of which is in the following terms, "that if any person shall commence, sue, or prosecute any suit or suits for any debt, or debts, demand, or demands, made cognisable as aforesaid, in any *other* manner than is directed by *this* act, and shall obtain a verdict or judgment therein, which without costs, shall not amount to *more* than 100 dollars, not having caused an oath or affirmation to be made before the obtaining of the writ of summons or *capias*, and filed the same in the prothonotary's office respectively, that he, she, or they so making oath or affirmation, did truly believe the debt due, or damage sustained, exceeded one hundred dollars, he, she, or they, so prosecuting shall not recover *costs* in any such suit."

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From this view of the law, a verdict and report being placed on the same legal ground by the act of 1705, it would appear too plain to be made a question, that where the plaintiff recovers *less* than 100 dollars, without the previous affidavit that he believed the defendant owed him *more*, he is bound by express and positive law to pay the costs. If a *jury* could not find a less sum than 100 dollars for the plaintiff, and compel the defendant to pay the costs, it is not possible the referees could do it; because the verdict and report are placed on the same ground.

There is a difference of expression in the acts of assembly which have been just mentioned, and the act of the 25th of September 1786, which provides, that if any plaintiff shall bring or commence any suit or action in the Supreme Court, and shall not recover thereupon, more than 50*l.*, he shall *not* be allowed any costs. In the former case, it is *always* in the power of the plaintiff, to exempt himself from the payment of the costs, by a previous affidavit. Unless he make such affidavit, it is strictly just he should pay *the costs*, for wantonly dragging the defendant into a higher tribunal; and this is unquestionably the language of the law.

In *England* they have no law, that gives equal validity to a report of referees, and to the verdict of a jury, and which compels the plaintiff to pay the costs, in consequence of his neglecting to make affidavit, that the defendant owes him *more* than a precise sum. Nor have they any references similar to those under our act of assembly. References in *Eng-*

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land under rules of court, are not fettered by positive law, with respect to *costs*, as they are in *Pennsylvania* in the case now before us. *The costs of action* in that country, are therefore discretionary with the referees, and they are equally so here, unless when some *restriction* is imposed on them by the *parties* themselves, or by some *express* law of the land. Unless restricted in one of these modes as to the *costs*, or unless they are made to abide the *event* of the suit, the *costs of action* are always *within* the submission. *Kyd on Awards*, 134, 135. 154, 155.

Upon the whole, we are clearly of opinion, and have uniformly and frequently so decided, that the legislative restriction with respect to *costs*, in the case before us, is equally binding on courts, juries and referees; and that neither tribunal can fly in the face of the law and say, *the defendant shall pay the costs*, in a precise case, where the legislature have, in express terms declared, *the plaintiff shall pay them*. It appearing to the court that the plaintiff hath not made the affidavit required by law, it is ordered, that judgment be entered for the sum of fifteen dollars *without costs*.

Judgment for plaintiff,
but without costs.

Common Pleas of Philadelphia.

GREEVES *against* M'ALLISTER.

1809.

Saturday,
July 15.

ASSUMPSIT for money paid laid out and expended by the plaintiff for the use of the defendant, and at his special instance and request. Plea, the general issue.

Upon the trial of the cause it appeared in evidence, that the plaintiff was special bail in 2000 dollars for one *Sterling*, in a suit brought in the Supreme Court, and that the defendant and another were bail in 5000 dollars for *Sterling*, in two suits brought in the Circuit Court of the *United States*. *Sterling* being destitute of property, and having gone out of the state, the plaintiff was fearful of being fixed for the debt, and took out a bail-piece, upon which he brought *Sterling* from *Baltimore* to *Philadelphia* at some expense, and surrendered him. On the day of the surrender he communicated it to the defendant, who promised to pay his proportion of the expense, and who the next day surrendered *Sterling* in each of the suits in the Circuit Court.

The action was brought upon this promise, which the defendant's counsel said was *nudum pactum*; but the court charged the jury, that if they believed the defendant had derived any benefit from the act of the plaintiff, the promise was binding in law, notwithstanding the consideration was past, at the time of the promise; and the jury found for the plaintiff 102 dollars 24 cents.

A motion was made for a new trial, upon the ground of misdirection.

Sergeant for the defendant contended that the consideration in evidence was not sufficient to support a promise, because it was past and executed, and the act was done not only without the defendant's previous request, but without his knowledge. That it was done moreover not with a view to benefit the defendant, but to benefit the plaintiff himself, the advantage which the former derived, being wholly involuntary as it respected the latter; so that there was no consideration upon the ground of benefit, or even upon the ground

Taking and surrendering a person upon a bail-piece for whom the plaintiff was bail, in consequence of which the defendant also surrendered him in a suit in which he was bail, is a good consideration to support a promise by the defendant after the surrender, to pay a proportion of the expense attending it.

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of moral obligation, if such an obligation could be held sufficient in law to support a promise. He cited *Hunt v. Bale* (a), 1 *Schw. N. P.* 48., 1 *Pow. on Contr.* 348., and 2 *Bl. Com.* 448.

Hallowell for the plaintiff, answered, that whether or not the promise could be supported upon the ground of moral obligation, which he confessed was a subject of doubt, after the learned note to *Wennall v. Adney* (b), yet it clearly might be upon the ground of benefit to the defendant; for that the spirit of all the modern authorities was, that if an act be done, though without the defendant's express request or even his knowledge, yet if it be for his benefit, and he afterwards receives the benefit, and promises payment, it is equivalent to a previous request. It was wholly immaterial, he said, that the plaintiff at the same time intended to benefit himself. His motives were not examinable. He cited 1 *Schw. N. P.* 49. note 8., *Osborne v. Rogers*, (c), and *Stokes v. Lewis* (d).

Rush President. It is extremely clear, that there was a *consideration* in this case, for the promise; because the defendant had, in fact, derived a very important benefit and advantage at the expense and labour of the plaintiff. When the interest of a man is promoted, though not at his request, and he deliberately after engages to pay for it, the law very properly says, he shall fulfil his promise. If two men bind themselves in behalf of a third, and one of them, to avoid an arrest, should pay the whole money, the other, in case of an actual promise, would be liable to pay his proportion. The old rule, that an action will not lie, where the consideration is *past*, has received a rational explanation from the liberal ideas that actuate modern courts of justice. Though the *service* has been rendered *prior* to the promise, yet if the party be under either a *legal* or *moral* obligation to pay, the promise will bind him. Where a bastard child was put to nurse by the uncle of the mother, it was held that a promise subsequently made by the father to pay for its support, was binding. An apothecary attended a pauper, but not at the

(a) *Dyer* 272.

(b) 3 *Bos. & Pull.* 249.

(c) 1 *Saund.* 264. n. 1.

(d) 1 *D. & E.* 20.

request of the overseers of the poor. A promise subsequently made by them to pay the apothecary, was held binding. In the one case, the promise was founded on a prior *moral* obligation; in the latter, on a prior *legal* obligation.

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I cannot think it material in this case, to inquire whether *Greeves* intended to confer a benefit on the defendant, when he went to *Baltimore*. The fact is, he *has* done it. Nor is it material, whether he *informed* him of his intent, prior to his conferring the benefit. If moral obligation depended always upon the purity of *motive* in the benefactor, I fear there would be but little moral obligation left in the world. That *Greeves's* conduct in bringing up *Sterling*, was a disinterested act, is not asserted. But where a man equally promotes his own interest, and the interest of another, though the person benefited may not be under any tie of gratitude, yet surely he is under the obligations of moral honesty, to pay his share of the expense, incurred for the joint advantage and benefit of both. And if he promise, he ought to pay accordingly.

The case of *Cooper v. Martin*, 4 *East* 76., was not cited at the bar, and is a strong case in support of the present action. It was a suit against a child for his maintenance and education, by a stepfather, founded on a promise to pay, *after* the defendant became of age. The court was of opinion that the stepfather was not obliged to maintain the child; and that maintaining the child was a good consideration for a promise when it is of age, to repay the expense of such maintenance. Lord *Ellenborough* says, "the plaintiff having *done* an act for the defendant in his infancy, it is a good consideration for his promise, after he came of age. In such a case the law will imply a request, (by the defendant) and the fact of the promise has been found by the jury." Justice *Lawrence* says, "the plaintiff having conferred the benefit, without any obligation, it is a good consideration for the promise by the defendant *after* he came of age."

We would remark, that what were the *motives* of the stepfather, seems never to have been thought of. Whether his conduct in maintaining the child, sprang from affection and complaisance to the mother, or from thoughtless generosity; whether it was the effect of disinterested virtue, or of a mer-

APPENDIX. cenary and selfish spirit, seeking ultimately its own gain, are
GREEVES not hinted at in the case. The fact is, he had conferred a be-
 v nefit, and the court looked no farther than to the benefit con-
M'ALLISTER. ferred by the plaintiff, and to the morality and honesty of
 the promise on the part of the defendant.

We are of opinion, a new trial ought not to be granted.

New trial refused.

AN INDEX TO THE PRINCIPAL MATTERS.

ABATEMENT.

See PARTITION, 2.

ACCOUNT.

See ORPHANS' COURT.

Qu. Whether when goods are delivered to an agent to sell and remit, the law raises a promise by implication to *account*, so that an action on the case will lie for not rendering an account, although no express promise was made. *Schee v. Hussinger*.

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ACKNOWLEDGMENT.

See BARON and FEME. NOTICE. 2.

ACTUAL SETTLEMENT.

1. When an actual settler, who has made some improvements, has been deterred by the violence of a younger settler from completing his settlement, and has for several years

neglected to take steps for the recovery of his possession, it is a fact for the jury to decide whether he has not relinquished his settlement. He does not stand in the situation of a person having a legal title, who may bring ejectment at any time within twenty-one years. *Cosby v. The lessee of Brown*. 124

2. An actual settler cannot support an ejectment without a survey. *ib.*

AGENT.

See INSURANCE, 2.

The secretary of an incorporated company, who as such signs a lottery ticket for the company, is not personally responsible to the holder. *Passmore v. Mott*. 301

AGREEMENT.

An agreement by a surety to forbear a suit against his principal, *after he shall have paid the principal's debt*, is a good consideration to support a promise, although at the time of the

agreement the surety had no cause of action against the principal. *Hamaker v. Eberley*. 506

ALIEN.

1. An alien who has resided in *Pittsburgh* one year next preceding an election for borough officers, and has within that time paid a borough tax, is entitled to vote at such election. *Stewart v. Foster and others*. 110
2. The argument for excluding aliens from the privilege of voting at borough elections is not so forcible in *Pennsylvania* as it would be in *England*, because *Pennsylvania*, both under the proprietary government, and since her independence, has held out encouragement to aliens, unknown to the principles of the common law. 118

ALIMONY.

1. An order of alimony upon a divorce *a mensa et thoro*, continues in force only until the reconciliation of the parties. If therefore the wife returns at the solicitation of the husband, and cohabits with him but for five weeks, and then leaves him without just cause, she loses her right to alimony. *Tiffin v. Tiffin*. 202
2. *Quere* whether the court would revive the order, and compel the payment of arrears, if after such a reconciliation the wife was turned out of doors by the husband, or compelled by his treatment to withdraw. *ib.*

AMENDMENT.

1. Under the act of 21 March 1806, amendments in matter of form are

allowable after the jury are sworn. *Gordon v. Kennedy*. 291

2. Clerical errors are amendable as well in criminal as in civil cases. *Sharff v. The Commonwealth*. 514

APPEAL.

See JUSTICE OF THE PEACE, 2.

APPEARANCE.

See ERROR, 3.

- A general appearance by an attorney, entered opposite the names of two defendants, is a good appearance for both, although one has not been summoned. *Scott v. Israel*. 145

ARBITRATION.

1. The arbitration law of 29th March 1809 embraces actions in the Supreme Court; but an appeal from the award of arbitrators lies only to the Common Pleas. *Carpentier v. The Delaware Insurance Company*. 264
2. After a cause has been once decided either by a jury, a justice of the peace, or by referees, and is remaining in court for a decision on matter of law, it is not in the power of either party to submit it to arbitration under the act of 29th March 1809. *Mann v. Alberti*. 195
3. If the defendants in an arbitration are a body corporate, they are entitled to appeal without entering into a recognisance of bail. 264

ASSIGNMENT.

1. An assignment by a debtor, of all his property to trustees for the be-

nefit of such creditors as should within a given time execute a release of all demands, is good, if certain of the creditors agree to accept it upon that condition, and is a transfer of the property for their use from the time of acceptance. If therefore a *fi. fa.* issued after the acceptance, but before the execution of a release by any creditor, be levied upon the goods assigned, the sheriff is a trespasser. *Lippincott v. Barker.* 174

Quere. Whether an assignment which stipulates for a release to the debtor, is valid upon general principles. *ib.*

ASSIZE.

An assize of nuisance commenced in the Common Pleas, may be removed by certiorari to the Supreme Court, the judges of which have jurisdiction as justices of assize, and may if necessary resummon the same jury who viewed the nuisance by command of the court below. *Livezey v. Gurgas.* 192

ASSUMPSIT INDEBITATUS.

1. When the terms of a special agreement to do a certain thing for a certain sum, have been performed by the plaintiff, the law raises a duty in the defendant, for which indebitatus assumpsit will lie. *Kelly v. Foster.* 4
2. The plaintiff declared in indebitatus assumpsit for work and labour, and proved a promise by the intestate to pay him 200*l.* if he would live with him until the intestate's death, which he accordingly had done. *Held* that the general count was supported by the proof. *ib.*

3. In an action of indebitatus assumpsit, the defendant may demand of the plaintiff to specify the nature of the evidence he means to offer, and until this is done, the court will not suffer the plaintiff to bring on the trial. 7

ATTACHMENT FOREIGN.

The court will not dissolve a foreign attachment merely because there has been no writ of inquiry executed for fourteen years, if the delay is accounted for. *Cooke v. Turner.* 453

AUDITORS.

See ORPHANS' COURT.

AVERAGE GENERAL.

Seamen's wages and provisions incurred during an embargo, are general average. *The Insurance Company of North America v. Jones and Clark.* 547

BAIL.

Upon the plea of *compervuit ad diem*, although it is by consent made an issue of fact, the acceptance of a plea and going to trial in the original action, do not entitle the bail to a verdict. Their only mode to take advantage of a waiver, is by application to the court. *Hayden v. Adams, assignee &c.* 232

BARON AND FEME.

A conveyance of the husband's land by husband and wife, without an acknowledgment by the wife agree-

ably to the act of 24th of February 1770, does not impair the wife's right of dower. *Kirk v. Dean.* 341

BARRATRY.

1. Any trick, cheat, or fraud, and any crime or wilful breach of law committed by the captain to the prejudice of his owners, is barratry. *Wilcocks v. The Union Insurance Company.* 574

2. The rescue of a neutral vessel by her own crew, from the hands of the captors who are taking her in for adjudication, is an act of barratry. *ib.*

BILL OF EXCEPTIONS.

1. If a judge in his charge expresses an opinion upon facts, which is not warranted by the evidence, the remedy is by a motion for a new trial, and not by a bill of exceptions. *Burd v. The lessee of Danedale.* 80
2. The refusal of the court to order a nonsuit, is no ground for a bill of exceptions. *Girard v. Gettig.* 234
3. No advantage can be taken by bill of exceptions, of an erroneous opinion on a point of law immaterial to the issue; but the plaintiff in error may assign error in an opinion on any point material to the issue, appearing on the bill of exceptions, although it was not particularized in stating the exceptions below. *The Phenix Insurance Company v. Pratt.* 308

BOND.

See EVIDENCE, 8. PLEADING, 2.

BROKER.

See INSURANCE, 1.

BY-LAW.

A by-law to expel a member for vilifying any of the members of a corporation is void, unless there is an express power in the charter to amove for such a cause. *Commonwealth v. The St. Patrick Benevolent Society.* 441

CARRIER.

Quere. Whether carriers by water on the Juniata and other rivers in Pennsylvania, are answerable in the same degree as common carriers by the law of England. It seems that they are. *Lea v. Stroud.* 74

CA. SA.

See EXECUTION, 1. POUNDAGE.

CASE STATED.

A motion to withdraw a case which had been stated by three parties, refused upon the application of one, notwithstanding one of the court had given an opinion in the cause, while at the bar, and another was a stockholder in the company by whom the action was brought. *Bank of North America v. Fitzsimons.* 454

CERTIORARI.

A certiorari to remove proceedings before a justice of the peace into the Supreme Court, does not re-

quire a special *allocatur*. *Commonwealth v. Willow Grove Turnpike Company*. 257

COMPERUIT AD DIEM.

See BAIL.

CONCESSIONS OF W. PENN.

The concessions or conditions of *William Penn*, executed on the 11th of July 1681, are confined to the first purchasers, and persons claiming under them. *Carson v. Blazer*. 475

CONSIDERATION.

See PLEADING, 5.

1. An agreement by a surety to forbear a suit against his principal, *after he shall have paid* the debt of the principal, is a good consideration to support a promise, although at the time of the agreement, the surety had no cause of action against the principal. *Hamaker v. Eberly*. 506

2. Taking and surrendering a person upon a bailpiece, for whom the plaintiff was bail, in consequence of which the defendant also surrendered him in a suit in which he was bail, is a good consideration to support a promise by the defendant *after* the surrender, to pay a proportion of the expense attending it. *Greaves v. McAllister*. 591

CONTRACT.

See LOTTERY.

CORPORATION.

See ARBITRATION, 3.

Without an express power in the charter, a corporator cannot be disfranchised, unless he has been guilty of some offence, which either affects the interests or good government of the corporation, or is indictable by the law of the land. *The Commonwealth v. The St. Patrick Benevolent Society*. 441

COSTS.

Referees under the act of 1705 cannot award costs of suit in the common pleas, upon a sum, which by the laws giving jurisdiction to justices of the peace, will not carry costs, unless there is an agreement in the rule that they shall have power over the costs, or the plaintiff had made an affidavit before the suit, that he believed the debt was beyond the sum within a magistrate's jurisdiction. *Guier v. McFaden*. 587

COVENANT.

A covenant by two tenants in common to pay the rent reserved by the landlord, is a joint covenant, notwithstanding their several interests in the land. *Phillips v. Bonsall*. 138

COURT.

A militia court of appeals, which by law is composed of *three commissioned officers appointed by the commanding officer of the regiment*, is not a court of record, as it has not the power to fine and imprison, but merely to remit fines for certain causes. Before its proceedings can be read in evidence, in an ac-

tion of trespass against a captain who justifies under its sentence, it must therefore be shewn that the court was regularly constituted, which can only be done by producing the commission of the commanding officer of the regiment, and the commissions of the officers composing the court, by shewing their appointment, and that in all material respects they have complied with the law. *Wilson v. John.*

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CUSTOM.

Quere, whether a custom that the owners of the banks of the *Susquehanna* shall have an exclusive fishery in the river opposite to their shores, is good? *Carson v. Blazer and others.*

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DAMAGES.

See PLEADING, 4.

DEED.

See BARON and FEME. NOTICE,
1, 2, 3, 4.

DEMURRER.

A variance between the declaration and the bond of which oyer is given, is matter of demurrer, but not of error. *Douglass v. Beam.*

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DEVISE.

1. The testator "as for such worldly estate wherewith it had pleased God to bless him," bequeathed

the same in part as follows: "To his wife one half of his *plantation* during her *natural life*; to his nephew *Seth* two thirds of his *plantation*, excepting what was above to his wife already willed; also to his nephew *Robert* one third of his *plantation*, excepting what was above willed to his wife." Held that the nephews took a *fee-simple* in the *plantation*, subject to the life estate of the wife in a moiety. *French v. McIlhenny*

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2. The testator, after beginning his will "as touching such worldly estate, &c." devised to his son *W.* seventy acres of land, and concluded the devise with these words: "if the said *W.* should chance to die without heir or issue, the above said lands must fall into the possession of his brother *R.*" He then devised certain chattels to *W.* and ordered him to pay 40*l.* to his sister, in four annual instalments; after which he devised the remainder of his *plantation* to his son *R.* in the same manner as he had before devised to *W.* *W.* took an estate tail with a contingent remainder to *R.* upon the event of *W.*'s dying without issue in the lifetime of *R.* *Lessee of Willis v. Bucher.*

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3. Where the payment of a sum in gross is annexed to a devise of land in general terms without expressing any estate, the devisee takes a fee; but where the estate of the devisee is plainly indicated, a direction to make such a payment has no effect to alter the estate.

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4. The testator devised his *plantation* to his son *F.* and his heirs and assigns for ever, subject to the payment of a sum of money, which he ordered *F.* to pay by instalments to his other son *P.* He also gave *F.* certain horses, cows, &c., and then ordered that in case his son *F.* should die under the lawful age of twenty-

one year, or without lawful issue, his share in the testator's whole estate should go to *P.*, his heirs and assigns; and if *P.* died under the lawful age of twenty-one or without issue, his share should go to *P.*, his heirs and assigns; and in either case the survivor of his said two sons should then pay 500*l.* to the testator's daughter or her heirs. By a codicil he ordered *F.* not to sell any part of the land before he was thirty, when he might do with it as he pleased. Held that *F.* took a fee, with an executory devise to *P.* to take effect upon *F.*'s dying under age and without issue; and *F.* having attained twenty-one and then died without issue, the estate descended to *F.*'s heir at law. *Lessee of Hauer v. Sheetz.* 532

DISFRANCHISEMENT.

Without an express power in the charter, a corporator cannot be disfranchised, unless he has been guilty of some offence, which either affects the interests or good government of the corporation, or is indictable by the law of the land. *The Commonwealth v. The St. Patrick Benevolent Society.* 441

DISTRESS.

If a man distrain for rent, he must distrain for the precise sum due; he cannot add interest to the arrears of rent. *Bantleon v. Smith* 154

DIVORCE.

See ALIMONY.

DOWER.

A conveyance of the husband's land by husband and wife, without an

acknowledgment by the wife agreeably to the act of 24th February 1770, does not impair the wife's right of dower. *Kirk v. Dean.* 341

EJECTMENT.

1. A person who has purchased the defendant's interest in the premises at sheriff's sale, and after ejectment brought has obtained possession under the act of 6th April 1802, may be made a co-defendant, notwithstanding there may be persons interested in the purchase whose names are not disclosed. *Lessee of Murray & Ux. v. Galbraith.* 59
2. If the plaintiff claims under an improvement right only, he cannot support an ejectment, unless he has been in possession within seven years before the suit was brought. *Burd v. The Lessee of Dansdale.* 89
3. If the plaintiff in ejectment is bound in equity to make title to the defendant for a part of the premises, the court will do the defendant justice by staying execution until the title is secured. *Lessee of Mathers v. Akewright.* 93
4. An actual settler cannot support an ejectment without a survey. *Cosby v. The Lessee of Brown.* 124

EQUITY.

See HARD BARGAIN. LEGAL ESTATE.

If the plaintiff in ejectment is bound in equity to make title to the defendant for a part of the premises, the court will do the defendant justice by staying execution until the title is secured. *Lessee of Mathers v. Akewright* 93

ERROR.

See PRACTICE, 1.

1. A variance between the declaration and the bond of which oyer is given, is matter of demurrer, but not of error. *Douglass v. Beggs*. 76
2. The act of 24th February 1806, requiring the judges to reduce their opinions to writing, and to file them of record, makes no alteration as to those matters, which are the subject of revision upon a writ of error; and therefore the reasons of a judge for not granting a new trial, though filed of record, are not, however erroneous, subject to review upon a writ of error. *Burd v. The Lessee of Dunsdale*. 80
3. The decision of the Common Pleas upon a motion for a new trial is not the subject of a writ of error, notwithstanding the reasons of the court be reduced to writing, and filed of record. *Wright v. The Lessee of Small*. 93
4. If a judgment for want of appearance is entered against an administrator, and it appears by the precept that there were not ten days between the summons and return day, the judgment is erroneous. *Pittsmons v. Salomon*. 436
5. Upon an indictment for writing and publishing a libel on the characters of A and B, and also upon the memory of C deceased, the jury found the defendant "guilty of writing and publishing a bill of scandal against A and B, but not guilty as to any C deceased." Judgment reversed, because the defendant was not found guilty of the offence charged in the indictment. *Sharff v. The Commonwealth*. 514

ESTATE.

See DEVISE, 1, 2, 3.

Husband and wife conveyed the estate of the wife in trust for their use during their joint lives, and in case of the determination of the joint estate for life by the death of the wife before the husband without issue, then for the use of the husband in fee. Held that the dying without issue must be understood in its natural sense of a dying without issue living at the death of the wife; and the wife having left a child who survived her a few days, and then died before the husband, he did not take a fee. *Lessee of Huston v. Hamilton*. 387

EVIDENCE.

See COURT.

1. The verdict of a former jury in the same cause, which has been set aside by the court, is not evidence. *Ridgely v. Spenser*. 71
2. A deposition taken *ex parte* under a rule of court, after the hour named in the rule, cannot be read in evidence. But *semble* that it may, if the opposite party had notice, and did not attend at the hour named. *Bachman's case*. 72
3. In an action against a common carrier by water, for the loss of the plaintiff's goods, where the defence is set up that carriers by water are by custom answerable for loss only in case of negligence, it is not competent to the defendant to give evidence, that in a case where the plaintiff had acted as a common carrier, he had refused to make compensation for a loss. *Dean v. Swooph*. 72

4. A grantor is a good witness to support a title derived under a conveyance from him containing the words "grant, bargain, sell." *Lessee of Grutz v. Ewalt.* 95
5. A paper purporting to be a survey on an application belonging to a deputy surveyor, found among the assistant's papers at his death, but without any signature, or any evidence about it that it had been seen and recognised by his principal, is not evidence of a survey. *Lessee of McKinzie v. Crow.* 105
6. The grantor of a tract of land, who has not given any warranty, nor practised any deception, is a competent witness to support the title. *Lessee of Cain v. Henderson.* 108
7. Parol evidence is admissible to shew that a course and boundary in a survey and patent, are incorrectly stated, and that they are otherwise upon the ground. *Mageehan v. The Lessee of Adams.* 109
8. The assignor of a bond is a competent witness to prove that it was fraudulently obtained by him, or that it was given to raise money for the obligor, and that he used it to pay his own debt. *Baring v. Shippen.* 154
9. The rule that a man shall not invalidate an instrument to which he has given credit by signing his name, is confined in *Pennsylvania* to negotiable instruments. 165
10. Before the proceedings of a militia court of appeals can be read in evidence in an action of trespass against a captain who justifies under its sentence, it must be shewn that the court was regularly constituted, which can only be done by producing the commission of the commanding officer of the regiment, and the commissions of the officers composing the court, by shewing their appointment, and that in all respects they have complied with the law. *Wilson v. John.* 209
11. The existence of a written agreement of partnership between defendants, does not preclude the plaintiff from proving a partnership by the actions or declarations of the parties. *Widdifield v. Widdifield.* 245
12. The copy of a list of lands belonging to a person deceased, made out fifty years before the trial by his executor who is also deceased, is not evidence, nor would the original be if produced. *Lessee of Gallo-way v. Ogle.* 468
13. In an ejectment against a trustee, it is not competent to give evidence that he had notice of an unrecorded deed before his appointment; because it cannot affect the *cestui que trust.* *Lessee of Henry v. Morgan.* 497
14. An *ex parte* probate of a will, taken by the register at the instance of the defendants in an issue then pending to try the validity of another will by the same testator, is not valid; nor is the will so proved, evidence in the feigned issue. *Hantz v. Hull.* 511
15. In order to ascertain whether a republished will operates as a revocation of a prior will, the contents may be proved by parol, if the will itself cannot be found, and the usual ground is laid for introducing the secondary evidence. *Havard v. Davis.* 406

EXECUTION.

1. If a plaintiff levies a *Fi. Fa.* upon the defendant's lands, and then charges him in execution upon a *ca. sa.*, either the *fi. fa.* or *ca. sa.* may be set aside at the election of the defendant; but if he submits to the *ca. sa.*, and obtains a discharge from it by the insolvent law, then

the *fi. fe.* and all the proceeds under it are gone; and if the plaintiff sues out a *venditioni exponas* and sells, the court will not permit the sheriff to acknowledge a deed to the purchaser. *Young v. Taylor.*

218

2. An execution within a year and a day, continues the lien of a judgment, without resorting to a *scire facias* under the act of 4th April 1798.

218

3. The defendant in a suit before a justice of the peace, is entitled to enter special bail to obtain a stay of execution, after the twenty days allowed for an appeal have expired, provided an execution has not already issued. *Mann v. Alberti.*

195

EXECUTOR.

See ERROR, 3.

1. An executor who receives the surplus proceeds of his testator's land which has been sold under execution, is chargeable with them in account as executor, notwithstanding he is husband of the devisee of one half the estate, and claims to have received them in that character. *Guier v. Kelly.*

294

2. If an executor purchase the real estate of his testator at sheriff's sale, and it is afterwards sold again, in consequence of his not adhering to his purchase, he is chargeable in account with the largest of the sums at which it was struck off.

294

3. The plaintiff may proceed against an executor by *capias* to compel an appearance; but if he elects to proceed by summons, then, in order to entitle himself to judgment by *nil dicit*, he must pursue the act of 20th March 1724-5, as if the suit were against a freeholder. *Fitzsimons v. Salomon.*

436

EXTINGUISHMENT.

See RENT, 1.

FACTOR.

See MONEY HAD AND RECEIVED.

FARM.

Two detached pieces of land occupied as one farm, are within the meaning of the first section of the act of 17th March 1806, which prohibits certain turnpike companies from taking tolls from any person when passing from "one part of the farm to the other," along the turnpike road. *Commonwealth v. Carmalt.*

235

FI. FA.

See EXECUTION, 1.

FISHERY.

The common law doctrine, that fresh water rivers, in which the tide does not ebb and flow, belong to the owners of the banks, has never been applied to the *Susquehanna*, and other large rivers in *Pennsylvania*. Such rivers are navigable, although there is no flow and reflow of the tide, and they belong to the commonwealth. No one therefore has a right to an exclusive fishery therein, on the principles of the common law, nor has such a right been granted to any one, by the proprietaries, or by the commonwealth. *Carson v. Blazer.*

475

FORBEARANCE.

See AGREEMENT.

A promise to forbear suit in general terms, is to be understood a total and absolute forbearance. *Hamaker v. Eberly.* 506

FORGERY.

1. The publishing a forged note of hand, or any other writing of a private nature, *though not under seal*, as a genuine note or writing, with intent to defraud, is indictable at common law. *Commonwealth v. Searle.* 332
2. The publishing a counterfeit note of the bank of North America with intent to defraud, is indictable at common law, and is punishable by imprisonment at hard labour under the acts of 9th April 1790, and 4th April 1807. 332

HABERE FACIAS.

If the sheriff upon an *habere facias* delivers to the plaintiff the proportion that he has recovered in ejectment, and *after* the return day of the writ the plaintiff ousts the defendant of the whole, the court will not restore the defendant in a summary way. But it seems otherwise, if there is an actual ouster, *before* the return day of the writ. *Lessee of Gardiner v. Bridge Company.* 450

HARD BARGAIN.

The plaintiff brought his ejectment upon an equitable title, which although perhaps not unfairly obtained from the defendant, was accompanied by some suspicious circum-

stances, and at all events was very indiscreetly bartered away by the defendant. The jury, although instructed that the contract was lawful, found a verdict for the defendant, which the court refused to set aside. *Campbell v. Spencer.* 129

HEIR.

See INTESTATE.

The heir at common law takes the real estate of his intestate ancestor, except in the specific cases enumerated in the acts for regulating the estates of intestates. *Cresoe v. Laidley.* 265

IMPROVEMENT.

See EJECTMENT, 2.

INDICTMENT.

See LIBEL.

1. Where a statute *creates*, or *expressly prohibits* an offence, and inflicts a punishment, the statute punishment cannot be inflicted, unless the indictment concludes *contra formam statuti*; otherwise when the statute only inflicts a punishment, on that which was an offence before. *Commonwealth v. Searle.* 332
2. In an indictment for forging a bank note, it is not necessary to set forth the ornamental parts of the bill, as the devices, mottoes, &c. *ib.*

INQUISITION.

1. An inquisition is not necessary to the sale of an estate for life, or of

any other estate of uncertain duration. *Burd v. Lessee of Danesdale*.

80

2. An inquisition cannot be supported unless there has been notice in fact to the defendant, either of the levy, or of the time and place of holding the inquest. *Heydrick v. Eaton*. 215

3. In a proceeding by a justice of the peace &c. against a turnpike company, for permitting their road to be out of repair five days, it is necessary, that it should distinctly appear in the inquisition that the road has been out of repair five days, and that the part of the road complained of, be stated to be in the county where the justice has jurisdiction. *Commonwealth v. Willow Grove Co.*

257

INSURANCE.

1. If an insurance broker pays the premium to the underwriter after notice from the assured before the premium was due, that the risk never commenced, he cannot recover it from the assured and turn him round to a suit against the underwriter for a return. *Shoemaker v. Smith*.

839

2. If the general agent of neutral cargo covers belligerent property in the same vessel, though without the consent or knowledge of his principal, the property of his principal is liable to condemnation, notwithstanding it is plainly distinguished from the covered property by bills of lading and invoices on board; and the underwriters on that property, if warranted neutral, are discharged, either upon the ground that the warranty has not been performed, or that the risk has been increased by the agent of the assured. *Phenix Insurance Company v. Pratt*.

309

3. A vessel, stated in the body of the policy to be the "good British brig" called the *John*, was insured at the usual sea risk premium from *Havana to Baltimore*, with a written memorandum at the foot of the policy, that the insurance was against perils of the sea only, and was to end on capture. Held that the words "British brig," even if a warranty, did not imply that she was a British registered vessel, but merely that she was owned by a British subject; and it being proved that the owner was a Scotchman by birth, and that he navigated the vessel under a clearance and license from the British custom-house at *New-Providence*, this was sufficient *prima facie* to shew that he continued to be a British subject, without shewing his domicile or place of habitual residence. *Mackie v. Pleasants*. 363

4. To make a survey and condemnation for unsoundness, &c. a bar within the usual memorandum in policies on vessel, it must appear that the vessel was condemned for unsoundness or rottenness only. If the survey states injuries by storm as well as by decay, and concludes that the surveyors are therefore of opinion that the vessel is unworthy of repair and unfit for sea, and the decree of the admiralty is founded upon the report generally, such a survey and condemnation are not a bar. *Armroyd v. Union Insurance Company*.

394

5. Any trick, cheat or fraud, and any crime or wilful breach of law, committed by the captain to the prejudice of his owners, is barratry; as the rescue of a neutral vessel by her own crew, from the hands of the captors who are taking her in for adjudication. *Wilcocks v. Union Insurance Company*.

574

6. If the policy contains a warranty of neutral property, and at the same

time the usual agreement by the underwriter to answer for the barratry of the master and mariners, the warranty implies that the neutral character shall not be forfeited by any acts of the insured or their agents, except only, by such as may amount to barratry. 574

7. The crew of a neutral vessel, captured and sent in for adjudication, are not obliged to navigate her. It is the duty of the captors to put a sufficient force of their own on board her, and if they neglect to do it, they do not take sufficient possession, and the neutrals may consider her as abandoned to them. But if an insufficient force is put on board, in consequence of a promise by the neutral crew to navigate her to the destined port, they are bound by their promise, and must be considered for the purpose agreed on, as the hands of the captors. If in violation of their promise, they take the vessel into their own hands, it is an unlawful rescue, which is an act of barratry. *ib.*

8. Seamen's wages and provisions incurred during an embargo, cannot be recovered as a partial loss from the underwriters on freight. They are general average. *The Insurance Company of North America v. Jones and Clark.* 547

INTEREST.

1. The late proprietaries of *Pennsylvania* were in the habit of receiving the arrears of their ground rents without interest; and with respect to those rents, the law has been taken for granted, that interest upon them is not recoverable. *Bantleon v. Smith.* 154

2. *Quere*, whether interest on rent is recoverable in any case. 146

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3. Interest cannot be recovered upon the arrears of a ground rent, where the landlord resorts to the land for payment. *ib.*

4. A rule for trial or *non pros.* has no effect upon the plaintiff's right to interest. *Sulger v. Dennis.* 428

INTESTATE.

1. *A.* dies intestate, seised of real estate which descended from his father, and leaving a mother and brother of the half blood, a paternal aunt, and several cousins; the children of deceased paternal great uncles and aunts. This is a *casus omissus* in the intestate laws, and the estate descends to the heir at common law. *Cresoe v. Laidley.* 279

2. The heir at common law takes in all cases, except in those which are specifically enumerated in the acts of assembly relative to intestacies. *ib.*

JUDGMENT.

1. A judgment after one *nilhil* upon a *scire facias post annum et diem* may either be set aside for irregularity, or reversed on error; but the irregularity cannot be noticed collaterally in another suit; and even if the judgment be reversed or set aside, a purchaser at sheriff's sale, to whom a deed has been made, will hold the land. *Lessee of Heister v. Fortner.* 41

2. Judgment in a criminal case cannot be reversed in part and affirmed in part. If bad in part, it must be reversed altogether. *Jackson v. The Commonwealth.* 79

3. *Quere*, whether a sale of lands under a younger judgment, affects

4 H

the lien of an older one. *Young v. Taylor.* 219

4. An execution within a year and a day, continues the lien of a judgment, without resorting to a *scire facias* under the act of 4th April 1798. *ib.*

JURY.

The plaintiff, a master of a vessel, proved that while abroad he had expended money upon account of his owner the defendant, for seamen's wages, provisions, port duties, &c. *without shewing how much*; and the omission to produce vouchers, was in some measure accounted for by the capture of his vessel, and the loss of his papers. *Held* that under these circumstances the jury might make what they thought a reasonable allowance for disbursements without further evidence. *Sulger v. Dennis.* 429

JUSTICE OF THE PEACE.

1. Justices of the peace have no jurisdiction in trespass, when the damage exceeds twenty dollars; and although the summons be in debt or demand, yet if the evidence sent up shews it was in trespass, judgment for a greater sum will be reversed. *Dunn v. French.* 173
2. The defendant in a suit before a justice of the peace, is intitled to enter special bail, to obtain a stay of execution, after the twenty days allowed for an appeal have expired, provided an execution has not already issued. *Mann v. Alberti.* 195
3. In a proceeding by a justice of the peace, &c. against a turnpike company, for permitting their road to be out of repair five days, it is ne-

cessary that it should distinctly appear in the inquisition that the road has been out of repair five days, and that the part of the road complained of be stated to be in the county in which the justice has jurisdiction. *Commonwealth v. Willow Grove Turnpike Company.* 257

LACHES.

See SURVEY, 4.

LANDLORD AND TENANT.

A tenant cannot resist his landlord's recovery in ejectment, by virtue of an adverse title acquired during his lease. *Lessee of Galloway v. Ogle.* 468

LAND-OFFICE.

It has been the practice in the land-office since the revolution, to accept surveys made even since the year 1767 upon old warrants, notwithstanding they contained more than ten per cent. surplus. *Lessee of Steinmetz v. Young.* 520

LANDS.

Lands devised by a residuary clause are subject to the payment of legacies, upon a deficiency of the personal estate, if the testator has blended his real and personal estate together in the devise of the residue. *Hassancklever v. Tucker.* 523

LAW OF NATIONS.

The law of nations is part of the law of Pennsylvania. *Wilcocks v. The Union Insurance Company.* 581

LEGACY.

The testator ordered his just debts and funeral expenses to be paid by his executors, and then bequeathed a legacy of 500*l.* to *A.* to be paid her in one year after his decease, and in case of her death to be divided among her three sisters. He also devised specific real estate to *B.* and a legacy of 100*l.* to be paid at lawful age, but in case of his death unmarried, the *land and money* to sink into his residuary estate. The *rest and residue of his estate real and personal* he devised and bequeathed to his brothers and sisters their heirs and assigns as tenants in common, provided that his sister *M.* should keep the *whole* in her possession during her widowhood. *Held*, that the testator having blended his real and personal estate, the real was subject to the burden of *A.*'s legacy, upon the deficiency of the personal; and that the legacy was not to wait for the expiration of *M.*'s life estate in the land, but to be paid in one year after the testator's decease. *Hassan-clever v. Tucker.* 525

LEGAL ESTATE.

A warrant and survey with payment of the purchase money, are to be considered in *Pennsylvania* in the same light as the legal estate in *England*, and are not to be distinguished, as to conveying, intailing, and barring intails, from estates strictly legal. *Lessee of Willis v. Bucher.* 455

LEVY.

See PURCHASER, 3.

A levy upon any thing less than a whole tract or lot of land is void. *Snyder v. Caster.* 216 note.

LIBEL.

Upon an indictment for writing and publishing a libel on the characters of *A.* and *B.*, and also upon the memory of *C.* deceased, the jury found the defendant "guilty of writing and publishing a *bill of scandal* against *A.* and *B.*, but not guilty as to any *C.* deceased." Judgment reversed, because the defendant was not found guilty of the offence charged in the indictment. *Sharff v. The Commonwealth.* 514

LIEN.

1. The proprietor of a ground rent in fee, who obtains a judgment in covenant for the arrears, and sells the land, is intitled to be paid the whole of the rent in arrear out of the proceeds, in preference to older judgments. *Bantleon v. Smith.* 146
2. An execution within a year and a day, continues the lien of a judgment, without resorting to a *scire facias* under the act of 4th April 1798. *Young v. Taylor.* 218
3. *Quere*, whether a sale of lands under a younger judgment, affects the lien of an older one? 231

LOTTERY.

The defendant purchased of the plaintiff five hundred lottery tickets, for which he gave his promissory note, payable one day after the conclusion of the drawing of the lottery. There was an irregularity in the drawing, caused by inserting in one wheel thirty-nine numbers twice, and omitting thirty-nine numbers altogether; but none of the defendant's numbers were omitted, all the prizes were duly paid, and he never offered to return any of the

tickets purchased by him. *Held* that it was not competent to the defendant, to resist the payment of his note upon the ground that the lottery was not drawn. *Neilson v. Mott.* 301

MANDAMUS.

1. A mandamus lies to the supervisors of the roads, to compel them to pay an order drawn upon them by justices of the peace, under the direction of an act of assembly. *Commonwealth v. Johnson.* 275
2. The supreme court will not grant a mandamus to the trustees of an incorporated church, to restore the prosecutor to the possession of a pew, to which he claims title, inasmuch as he has another remedy by action on the case against the person disturbing him. *Commonwealth v. Rosseter.* 361

MILITIA.

See COURT.

MONEY HAD AND RECEIVED.

1. Where goods were delivered to a factor to sell and remit, and he sold a part payable in coffee, and afterwards remitted sugars on account, but gave no further statement either of sales or receipts, the jury were at liberty to presume that the amount sales had come to his hands in money, and therefore the principal might recover it upon a count for money had and received. *Schee' v. Hassinger.* 325
2. Where the principal assigns a fund to trustees to pay a creditor whom the surety afterwards pays, and the

proceeds of the fund are then paid over by the trustees, the surety is intitled to the benefit of the fund, and may recover it from the person who possesses it, in an action for money had and received, in his own name. *Miller v. Ord.* 382

MONEY LAID OUT AND EXPENDED.

Where an agent proves the disbursement of money for his principal, but is unable to fix the *quantum*, and accounts for not producing vouchers, by shewing a loss or spoliation of his papers, the jury may make a reasonable allowance without further evidence. *Gulger v. Dennis.* 429

NEW TRIAL.

1. When the judge who tried the cause, is not dissatisfied with the verdict, it must be a very strong case that will induce the court to grant a new trial, upon the ground that the verdict is against evidence. *Lessee of Cain v. Henderson.* 108
2. The plaintiff brought his ejectment upon an equitable title, which although perhaps not unfairly obtained from the defendant, was accompanied by some suspicious circumstances, and at all events was very indiscreetly bartered away by the defendant. The jury, although instructed that the contract was lawful, found a verdict for the defendant, which the court refused to set aside. *Campbell v. Spencer.* 129
3. Though a verdict be against the opinion of the judge who tried the cause, yet if it turned upon the credit of witnesses, a new trial will not be granted, except in extraordinary cases. *Lessee of Fehl v. Good.* 495

4. The discovery of material evidence after the trial, which by using due diligence the party might have discovered before, is no ground for a new trial. *Knox v. Work.* 582

NONSUIT.

It is not in the power of the court to order a nonsuit against the consent of the plaintiff. He may refuse to enter it, and insist upon taking a verdict. *Girard v. Gettig.* 234

NOTICE.

1. The registry of a deed defectively proved or acknowledged, is not constructive notice to a subsequent purchaser, although the registry be made in the proper county. *Lessee of Hiestor v. Fortner.* 40
2. On the 28th April 1788, A. assigned to trustees for the benefit of creditors all his lands in the county of N. &c.; and the same day acknowledged the deed before a judge of the common pleas of the county of M., who at that time had no authority to receive an acknowledgment of deeds for lands out of his proper county. On the 26th February 1790 the assignment was recorded in the county of N. On the 25th March 1789 B. obtained judgment against A. in the county of M. On the 13th March 1792 he executed an instrument recognising the assignment of A., and agreeing to be bound by its terms. To February term 1796, B.'s executors issued a *scire facias* to revive the judgment, and signed judgment upon the return of one *nihil*. To August 1797 they issued a *test. fi. fa.* to the county of N. and a *test. vend. exp.* to November 1797, upon which certain of the lands assigned by A., were sold to C. the

lessor of the plaintiff. *Held*, that although the judgment upon one "*nihil*" was erroneous, and actual notice of the assignment was bro't home to B., which made the subsequent proceedings a fraud upon the creditors, yet as the assignment was defectively acknowledged, the record in N. was no notice to C. who being a *bona fide* purchaser at sheriff's sale without notice, was intitled to recover. 41

3. The purchaser under a patent from the Commonwealth, is bound to take notice of the title recited in the patent, and is affected with notice of what appears on that title, although it is contrary to the patent. *Lessee of Willis v. Bucher.* 455
5. The recording act of 1775 does not make void an unrecorded deed, as against a subsequent purchaser without notice, under a title totally unconnected with that deed, but only as against purchasers under the same grantor. *Lessee of Henry v. Morgan.* 497

NUDUM PACTUM.

See CONSIDERATION, 1, 2.

ORPHAN'S COURT.

If there are errors in an account reported by auditors to the Orphan's Court, and confirmed by their decree, the Supreme Court upon an appeal will rectify them as the Orphan's Court should have done, and not set aside the whole account. The auditors are mere clerks. *Guier v. Kelly.* 296

OYER.

See PLEADING, 1. PRACTICE, 2.

PARTITION.

1. The statute of 8 & 9 W. 3. c. 31, concerning partitions, does not extend to this state. *M'Kee v. Straub.* 1
2. One of three defendants in a writ of partition was tenant of the freehold, and died after action brought, and before trial; the other two were his tenants for years or at will. Held that the writ was abated by his death; and if not, the survivors were intitled to a verdict upon the plea of *non tenent insimul.* *ib.*

PARTNERSHIP.

The existence of a written agreement of partnership between defendants, does not preclude the plaintiff from proving a partnership by the actions or declarations of the parties. *Widdifield v. Widdifield.* 245

PATENT.

See EVIDENCE, 7. NOTICE, 3.

A patent is *prima facie* evidence of title and of survey. *Lessee of James v. Betz,* 12

PAYMENT.

See PLEADING, 2.

PITTSBURG.

See ALIEN, 1.

PLANTATION.

See DEVISE, 1.

PLEADING.

1. The plaintiffs declared upon a bond dated the 20th day of May 1799. The defendants craved *oyer*, and then pleaded payment, upon which issue was joined. Held that upon this issue after *oyer* the plaintiff might give in evidence a bond dated the twentieth *eight* day of May 1799. *Douglass v. Beam.* 76
2. The plea of "layman and unlettered, &c." is not necessary in *Pennsylvania*. Fraud either in the execution or the consideration of a bond may be given in evidence under the plea of payment. *Baring v. Shippen.* 154
3. The plaintiff declared upon a promise on the 8th July 1805 to pay him eight hundred dollars *per annum*, and to find him a lodging room, bed, and fuel; and laid breaches of the contract, upon which the jury assessed general damages. Judgment was reversed, because it appeared by the record, that the action was brought before the eight hundred dollars were due. *Gordon v. Kennedy.* 287
4. Where the plaintiff declares upon a contract consisting of several parts, and assigns among other breaches, one which from his own shewing could not have taken place before the action was brought, the court cannot intend that the damages, if assessed generally, were given only for that matter in the count which was actionable, and therefore will reverse the judgment. 287
5. The plaintiff declared, that he informed the defendant he was apprehensive that *he should have to*

pay certain bonds in which he was joined with his principal, and that *he would sue* the principal, whereupon in consideration that the plaintiff *would refrain from suing*, the defendant promised to save him harmless, &c. After verdict, this is to be intended an agreement to forbear suit, *after* he had paid the money. *Hamaker v. Eberley.* 506

6. In an action of slander, it is enough if it be substantially alleged that the words were spoken of the plaintiff; an express averment of that fact is not necessary. *Brown v. Lamberton.* 34

POUNDAGE.

The sheriff is not intitled to poundage upon a *ca. sa.* unless he receives and pays the money. *Milne v. Davis.* 137

PRACTICE.

See REPORTS OF REFEREES.

1. When the words "and issue" are inserted upon the docket after the entry of an issuable plea, it is considered as a direction to the clerk to join the issue, and the omission of it is treated, after error brought, as a clerical mistake. But if the issue is not formally joined, and the memorandum is not made upon the docket, the judgment is erroneous. *Brown v. Barnett.* 33
2. Where the docket entries set forth, that "*defendant craves oyer of writ and bond, and special imparlance,*" and then that "*defendant pleads payment with leave &c.*" the bond is considered by the practice in *Pennsylvania*, as having been placed on the record. *Douglase v. Beam.* 76

3. Rule 55 of the supreme court 15th April 1781 does not give a priority to a certiorari to a justice, unless it is claimed before the arrangement of the argument list; and indeed it seems that the rule is obsolete. *Smith v. Diehl.* 145
4. A general appearance entered on the docket by an attorney, opposite to the names of two defendants, is a good appearance for both, although one has not been summoned. *Scott v. Israel.* 145
5. The plea of "layman and unlettered &c." is not necessary in *Pennsylvania*. Fraud either in the execution or the consideration of a bond, may be given in evidence under the plea of payment. *Baring v. Shippen.* 154
6. The supreme court does not hear evidence upon a certiorari to the quarter sessions to remove proceedings in a road cause. *Case of the Schuylkill Falls Road.* 250
7. A *Scire Facias ad audiendum errores* is not in use in *Pennsylvania*. The plaintiff in error proceeds by a rule on the defendant to plead. *Commonwealth v. Emery.* 257
8. A certiorari by the defendant to remove the proceedings in an inquisition under a turnpike act does not require a special *allocatur*. *Commonwealth v. Willow Grove Turnpike.* 257
9. The plaintiff may proceed against an executor by *captias* to compel an appearance; but if he elects to proceed by *summons*, then in order to intitle himself to judgment by *nil dicat*, he must pursue the act of 20th March 1724-5, as if the suit were against a freeholder. *Fitzsimons v. Salomon.* 436
10. A judgment after one "*nihil*" upon a *scire facias*, is irregular;

and may be set aside, or reversed on error. *Lessee of Heister v. Fortner*. 40

PRÆCIPE.

The *præcipe* for the original writ is a part of the record, and should regularly be sent up with the process and pleadings upon a writ of error. *Fitzsimons v. Salomon*. 436

PRINCIPAL AND SURETY.

Where the principal assigns a fund to pay a creditor, whom the surety afterwards pays, the surety is intitled to the benefit of the fund, and if converted into money, may recover it in an action for money had and received. *Miller v. Ord*. 382

PROBATE.

An *ex parte* probate of a will, taken by the register at the instance of one of the parties to an issue then pending to try the validity of another will by the same testator, is not valid. *Hantz v. Hull*. 511

PURCHASER.

1. A judgment creditor is not a purchaser or mortgagee within the meaning of the recording act of 1775; but a purchaser at sheriff's sale under that judgment is. *Lessee of Heister v. Fortner*. 40
2. A purchaser at sheriff's sale to whom a deed has been made, will hold the land, notwithstanding the judgment be set aside for irregularity, or reversed on error. 40
3. Where a levy is set aside, and a *vend. exp.* is issued without a fresh

levy, a sale under it is void, and the purchaser derives no title. The 9th section of the act of 1705, protects a purchaser in the event of a reversal of the judgment under which the sale was made, but not where the sale was made under void process. *Burd v. The Lessee of Danedale*. 89

QUARTER SESSIONS.

1. The Quarter Sessions have power to order a rereview of a road, although the act of assembly does not expressly authorize it. *Case of Schuylkill Falls Road*. 250
2. The Quarter Sessions is not an inferior jurisdiction, whose authority must appear by their proceedings to have been strictly pursued. The law will not intend that they have committed an error, when acting on a subject clearly within their jurisdiction; but will presume in cases which admit of presumption, *omnia esse rite acta*. 255

RECOGNISANCE.

The short minutes of a recognisance taken by a magistrate, and returned by him into court, where the recognisance was forfeited, may be given in evidence to maintain an action on the recognisance, provided they substantially shew the amount and condition, and that the party was bound to the commonwealth. *Commonwealth v. Emery*. 431

RECORDING ACT.

See NOTICE, 1, 2, 3, 4.

RELEASE.

See ASSIGNMENT, 1, 2.

RENT.

See INTEREST, 1, 2, 3.

1. There must be an union of the land and the rent in the same person, to work an extinguishment of the rent. A vested right to enter and hold the land until payment of the rent, is not sufficient. *Phillips v. Bonsall.* 138
2. The proprietor of a ground rent in fee, who obtains a judgment in covenant for the arrears, and sells the land, is intitled to be paid the whole of the rent in arrear out of the proceeds, in preference to older judgments. *Bantleon v. Smith.* 147

REPORTS OF REFEREES.

1. No exception to a report of referees, which does not appear wholly upon the face of the report, can be taken after the four days have expired. *Shoemaker v. Smith.* 239
2. The discovery of material evidence after a report made, which by using due diligence the party might have discovered before, is no ground for setting aside a report. *Aubel v. Ealer. Note.* 582
3. Referees under the act of 1705 cannot award costs of suit in the common pleas, upon a sum, which by the laws giving jurisdiction to justices of the peace, will not carry costs, unless there is an agreement in the rule that they shall have power over the costs, or the plaintiff had made an affidavit before the suit, that he believed the debt was beyond the sum within a magistrate's jurisdiction. *Guier v. McFadden.* 587

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RESCUE.

See INSURANCE, 7.

RIVERS.

The common law doctrine, that fresh water rivers in which the tide does not ebb and flow, belong to the owners of the banks, has never been applied to the *Susquehanna*, and other large rivers in *Pennsylvania*. Such rivers are navigable, although there is no flow and reflow of the tide, and they belong to the commonwealth. *Carson v. Blazer and others.* 473

ROADS.

1. It is not necessary that an appointment of viewers to lay out a road, should state that they are "freeholders and inhabitants near where" a complaint is made for want of a "road," although the act of assembly requires that they should be so. The Supreme Court will presume that the Quarter Sessions have made the appointment according to law. *Case of Schuylkill Falls Road.* 250
2. A reference to the improvements through which a projected road is to pass, need not be made in the report of viewers &c. They may be shewn in the plot or draft. 250
3. The sessions have power to order a rereview of a road, although the act of assembly does not expressly authorize it. 250
4. If it appears by the report of viewers, that a county commissioner attended the view, it is sufficient to shew that notice was given to the commissioners, agreeably to the standing order of the sessions. 250

4 I

SALE.

1. A sale of lands after the return day of the *venditioni exponas*, is not void, if the lands were advertised for sale on a day before, and the sale was continued by adjournment. *Burd v. The Lessee of Dansdale.* 80
2. Where a levy is set aside, and a *venditioni exponas* is issued without a fresh levy, a sale under it is void. 80
3. An inquisition is not necessary to the sale of an estate for life, or any other estate of uncertain duration. 80

SCIRE FACIAS.

See PRACTICE, 7, 10.

1. If the lands of the defendant are aliened by him before the plaintiff's judgment or execution, the plaintiff is not obliged to take a *scire facias* against the terretenants, before he can have execution in the hands of the alienee. *Young v. Taylor.* 218
2. A *scire facias* is not necessary to continue a lien upon lands, by the act of 4th April 1798, if an execution has issued upon the judgment within a year and a day. *ib.*

SHERIFF.

See TRESPASS. POUNDAGE.

SHERIFF'S DEED.

The court will not permit the sheriff to acknowledge a deed to a purchaser, if the sale has been made under void or irregular process. *Young v. Taylor.* 218

SHERIFF'S SALE.

See SALE, 1, 2, 3.

SLANDER.

1. In an action of slander, it is enough if it be substantially alleged that the words were spoken of the plaintiff; an express averment of that fact is not necessary. *Brown v. Lamberton.* 34
2. To say of a married man, "he played with *Mary Parkinson* in a fother room, and *Robert* the second son of *Parkinson* belongs to" the plaintiff, is actionable. *ib.*
3. "She swore a false oath, and I can prove it," are not actionable; nor are the words helped by an innuendo of perjury. *Packer v. Shangler.* 60

STATUTE.

See PARTITION, 1.

SUMMARY RELIEF.

If the Sheriff upon an *habere facias*, delivers to the plaintiff the proportion that he has recovered in ejectment, and before the return day of the writ, the plaintiff actually ousts the defendant of the whole, it seems that the court will restore the defendant in a summary way. *Lessee of Gardiner v. Bridge Company.* 450

SUPREME COURT.

The justices of the Supreme Court have jurisdiction as justices of assize. *Livzey v. Gorgas.* 192

SURETY.

If a surety pays the debt of his principal, he is intitled to the benefit of the fund assigned by the principal to the creditor as a security; and if that fund has been converted into money, the surety may recover it in an action for money had and received. *Miller v. Ord.* 382

SURVEY.

See INSURANCE, 4.

EVIDENCE, 5. 7.

WARRANT and SURVEY, 1. 3, 4, 5, 6, 7, 9, 11, 12.

EJECTMENT, 4.

TENANTS IN COMMON.

See WARRANT and SURVEY, 4.

A covenant by two tenants in common to pay the rent reserved by the landlord, is a joint covenant, notwithstanding their several interests in the land. *Phillips v. Bonsall.* 138

TRESPASS.

If the sheriff levies a *fi. fa.* against *A.* upon property which previous to the delivery of the execution he had assigned with the consent of most of his creditors to trustees, for the benefit of such as should sign a release in four months, he is a trespasser, although at the time of the levy no release had been executed. *Lipfincott v. Barker.* 174

TRUST.

See ESTATE.

When an estate is conveyed in trust to serve certain uses, a resulting

trust arises by implication of law to the grantor and his heirs, for all such parts of the equitable estate, as are not disposed of by the deed. *Lessee of Huston v. Hamilton.* 387

VERDICT.

See EVIDENCE, 1. ERROR, 5.

USE.

See TRUST.

WARRANT AND SURVEY.

1. Before a survey has been returned, it is competent to the deputy surveyor to extend the lines so as to cover any land not appropriated, to the amount of the quantity in the application. But if after the survey has been executed, and before the extension of the lines, a survey has been made upon a younger, or even a *shifted* application, and returned into office, or made known to the owner of the first survey, it is not in the power of the latter to extend his lines so as to include land within the last survey. *Lessee of Biddle v. Dougall.* 37

2. A warrant issued from the land office on the 5th April 1774, for 300 acres in the name of *A.*, upon which the purchase money was paid. It was surveyed in 1776 under the direction of *B.*, and the deputy surveyor marked upon the survey, that it was in dispute between *B.* and *C.* In 1778 *B.* was killed by the Indians, and his house and papers burned. The land was afterwards sold under execution as the property of *B.*, and up to the trial of the ejectment by the purchaser in 1807, no person had ever claimed *A.*'s

warrant in opposition to *B.* Held that these circumstances were sufficient evidence, that *B.* was the owner of *A.*'s warrant. *Lessee of Evans v. Nargong.* 55

3. Where a survey made and returned into office for *D.* is claimed by *C.* under his own application, *C.* has no right to make any addition to the survey returned, without an order from the land-office; and no private intention or action of his, can hinder the proprietaries from selling the adjoining land to any person who may apply for it. *ib.*

4. *A.* and *B.* purchase a warrant and survey as tenants in common. *B.* resides in *England*, and *A.* is the acting partner in *Pennsylvania*, who carries on all the correspondence with an agent, in relation to the land surveyed. *A.* ten years after the return of survey into office, by indorsement thereon in the surveyor general's office, declares "that the survey not having been made on the land called for by the warrant, on which it is returned," (which was the fact) "he thereby relinquishes the right to the same to *C.*" *B.* did not dissent from the relinquishment for 18 years, when he and *A.* conveyed the tract to a purchaser for a valuable consideration. Held that the indorsement upon the survey by *A.* was an abandonment of the survey by both partners, and that their vendee could not recover any part of it. *Lessee of M^r Knight v. Yingland.* 61

5. On the 28th July 1773, *A.* took a warrant from the land-office descriptive of certain land, which was surveyed on other land the 15th June 1774. The survey was returned into office before the 26th of August 1783; for on that day an indorsement was made upon the return by a clerk in the land-office, that "*A.* believed the survey wrong

"laid, and requested the surveyor to adjust it, which he had agreed to."

On the 17th September 1787 *A.* applied to the board of property for an order to survey his warrant on the land it called for, which was granted, and the survey was accordingly made on the 26th of November 1787, and returned the 27th February 1788. On the 26th October 1772, *B.* took a warrant descriptive of certain land, and on the 19th June 1785 surveyed it upon land it did not call for, namely, the land called for in *A.*'s warrant of 1773, the premises in the ejectment. The survey was returned into office probably in 1785 or 1786, but at the latest on the 9th June 1787, and was patented the 4th January 1788. Held that *A.* by his neglect to follow up his objection to the survey made in 1774, had lost his claim to the land described in his warrant of 1773, and that *B.* was intitled to recover. *Lessee of Milce v. Potter.* 65

6. A survey made by an assistant deputy surveyor for himself, is of no validity until it is recognised by his principal. *Quere*, whether a survey made by a deputy surveyor for himself, has any validity until it is accepted by the surveyor general. *Lessee of M^r Kinzie v. Crow.* 105

7. An actual settler cannot support an ejectment without a survey. *Cosby v. Lessee of Brown.* 124

8. The act of 19th February 1801 which authorizes the receiver general to give certificates of credit to certain persons whose lands fell within the state of *New-York*, to be used in taking out new warrants, operates so far as respects those warrants, as a repeal of all former laws requiring a settlement, previous to the issuing of a warrant. *Commonwealth v. Cochran.* 270

9. A warrant and survey with payment of purchase money, are to be considered in *Pennsylvania* in the same light as the legal estate in *England*, and are not to be distinguished, as to conveying, intailing, and barring intails, from estates strictly legal. *Lessee of Willis v. Bucher.* 455

10. When a claim set up by a third person to a warrant and survey, remains undisputed for the space of between thirty and forty years, and there is nothing to shew that the warrantee has transferred his title to any one else, it is strong evidence to prove that the right of the warrantee vested in the claimant by some conveyance which is lost. *Lessee of Galloway v. Ogle.* 468

11. A survey of 288 acres in the old purchase, made in 1788 upon a warrant for 100 acres issued in 1751, was returned into office before any other person had acquired a right, and was not objected to by the surveyor general. This is a sufficient title to recover in ejectment. *Lessee of Steinmetz v. Young.* 520

12. It has been the practice in the land office since the revolution to accept surveys made since the year 1767 upon old warrants, notwithstanding they contained more than ten per cent. surplus. *ib.*

WARRANTY.

The words "grant, bargain, sell," do not under the act of 1715, amount

to a general warranty, but merely to a covenant, that the grantor has not done any act, nor created any incumbrance, whereby the estate granted by him may be defeated. *Lessee of Gratz v. Ewalt.* 95

WILL.

A will in writing of lands may be revoked by the parol republication of a former will in writing, and in order to ascertain whether the republished will operates as a revocation, the contents may be proved by parol, if the will itself cannot be found and the usual ground is laid for introducing the secondary evidence. *Havard v. Davis.* 406

WITNESS.

See EVIDENCE, 4. 6. 8.

It lies on the party who objects to the competency of a witness on the ground of interest, to shew an interest or supposed interest at the time of the oath being administered. It is not enough that the witness at a former period conceived himself to be interested. *Lessee of Henry v. Morgan.* 497

WORDS.

See SLANDER, 2, 3.

END OF VOLUME II.

G. R. J. C.

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